Disclaimer: Some parts of this outline may heavily incorporate text and ideas from the textbook, Black’s Law Dictionary, the professor’s notes or handouts, and previous student outlines.

A BRIEF HISTORY OF CIVIL PROCEDURE

WHERE ARE WE HEADING?

1. **Two conflicting themes:** 1) Procedure is looked at as a formal means of containing civil disputes; 2) Human situations and particularly human disputes do not easily lend themselves to rigidity and formalism.
2. The **tension** between on the one hand the narrowing focus of the story confined by substantive law and procedure, and on the other, the need to tell larger stories, is played out in some measure in the history of the different procedures of law courts and equity courts dating back to the middle ages.

ORIGINS IN THE ENGLISH SYSTEM

1. **Common law procedure:** Three major characteristics: 1) writs; 2) single-issue pleading; and 3) jury. Writs became so formalized that a plaintiff could not get into court without fitting into a specific category. Writs began to connote what events would permit a remedy. A factual dispute would be brought to a jury.
2. **Equity procedure:** Bills in equity were written to persuade the Chancellor to relieve the petitioner from an alleged injustice that would result from the rigorous application of the common law. One could turn to equity only if there was no adequate remedy at law. The Chancellor, not juries decided equity cases, and did not take testimony in open court, but relied on documents to decide a case.
3. **Pre-twentieth-century America:** Equity was very burdensome due to too many parties, issues, and papers. To the common people it represented uncontrolled discretion, arbitrariness, and needless delay and expense. Common law procedure was much simpler. The jury was viewed as a means of permitting laymen to partake in governing themselves, educating the citizenry, and controlling the discretion and possible arbitrariness of judges.

HISTORY OF THE FEDERAL RULES

1. **Field Code:** Mid 1800s New York. Practice Commission enabled to "revise, reform, simplify, and abridge the rules of practice, pleading, forms, and...report." Provided the same type of procedure for almost all cases. Reduced the number of pleadings to complain, answer, reply, and demurrer, and discarded the single-issue rule. Eliminated interrogatories. “Complaint should be brief, in ordinary language, and without repetition; answer should be the same. Answer should disclose whole defense. Enables parties to prepare for trial. Assists the jury and court in performing their functions. The defendant may plead as many pleas to each count as he likes.”
2. **Rules of Decision Act, 1789:** "Laws of states, except where US laws should otherwise require, shall be regarded by the US courts where they so apply.”
3. **Conformity Act, 1872:** Required federal courts to follow state procedures. Led problems in equity cases due to the forced application of outdated state laws. Solution was to have federal courts to apply historic equity laws instead of state law in equity cases. Federal Equity Rules of 1913 served as a model for uniform federal rules of procedure. Simple and efficient, but needed more formalization.
4. **Rules Enabling Act, 1934:** Authorized Supreme Court to draft uniform federal rules. 14-person advisory committee appointed by Supreme Court. Rules established in 1938. (The Federal Rules of Civil Procedure are not actually statutes, since they did not go through the normal Congressional process, have not been voted on, nor signed by the President.)

POLICY CONSIDERATIONS:

1. Less cost, more efficiency.
2. Making the law more understandable an accessible.
3. Trans-substantivity is favored.

A QUICK INTRODUCTION TO PARTIES, JURISDICTION, REMEDIES, SOURCES, AND BURDENS

PARTIES:

1. **Plaintiff:** Complaining party.
2. **Defendant:** Those named in fault or responsibility.

JURISTICTION:

1. **Subject matter:** A court must be authorized by the constitution and statutes to decide cases dealing with a particular kind of subject.
2. **Personal:** The court selected by the plaintiff must have authority to direct the defendant to appear and to bind the defendant with a judgment.

TYPES OF REMEDIES:

1. Money damages to compensate the plaintiff.
2. Money damages to punish the defendant.
3. A declaration of the rights and duties of parties.
4. Injunctions.

SOURCES FOR RULES AND DOCTRINES:

1. **Federal Rules of Civil Procedure:** Authorized by Congress and prescribed by the Supreme Court.
2. Local rules.
3. **Court-made doctrines:** Common law practices and statutory interpretation.

BURDENS ON THE PLAINTIFF:

1. State a claim for which they are entitled to relief.
2. Meet a production burden.
3. Meet a burden of persuasion.

TIMELINE OF CIVIL LITIGATION

PRE-SUIT:

1. Something bad happens; determination if the circumstances are legally cognizable and if the elements of a claim have been satisfied.
2. Consideration of joinder of claims or parties.
3. Consideration of personal and subject matter jurisdiction and venue.
4. Defendants must be given due process.

PLEADING:

1. Complaint
2. Preliminary motions (extensions, removal to federal court, etc.)
3. Pre-trial motions to dismiss/amend
4. Amendments
5. Answer, including admissions/denials and affirmative defenses
6. Counterclaims or cross-claims
7. Motion for judgment on the pleadings (after pleadings have closed, but before trial)

DISCOVERY:

1. Parties gather information from each other that they otherwise may not be able to get.
2. Select information is subject to mandatory disclosure.
3. Questions to opposing parties, depositions, inspection of documents, motions to inspect real and personal property.
4. Summary judgment: If it appears, after or during discovery, that there is no way the one side can win its case, the other side can bring a motion for summary judgment. (There is no genuine dispute of fact; jury not necessary. Motion for a verdict when the case could not reasonably be decided any other way.

TRIAL:

1. Opening statements
2. Direct examination of each witness
3. Cross-examination of each witness
4. Closing arguments
5. If the defendant’s lawyer does not think there was a sufficiency of evidence to permit reasonable juries to find that all of the elements are true, that lawyer can move for a judgment as a matter of law, also called a directed verdict.
6. Jury Instructions
7. Verdict
8. Possible motions for renewed judgment as a matter of law (judgment notwithstanding the verdict), new trial, or to vacate judgment.
9. Judgment

APPEAL:

* + 1. In most instances, the losing party can only appeal from a final judgment.
    2. Highest courts have discretion over which cases they will hear.

NOTICE PLEADING

APPLICABLE RULES:

1. **Rule 8 (pages 82-83), Rule 9 (page 84)**
2. **Rule 8(a) (page 82)**: “**Claim for relief.** A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.”
3. **Rule 9(b) (page 84)**: “**Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”
4. **Rule 9(g) (page 84)**: “**Special Damages.** If an item of special damages is claimed, it must be claimed specifically.”
5. **Form 11 (page 319)**: Example of an acceptable complaint.
6. **Rule 12(b)(6) (page 93)**: dismissal for “failure to state a claim upon which relief can be granted”
7. **Rule 12(e) (page 93)**: “A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response…”

RELEVANT CASES:

1. ***Dioguardi v. Durning, 2d Cir. 1947* (pages 197-199)\***
   1. Poorly drafted, home-drawn complaint by unrepresented plaintiff with sub-par English language skills. Dismissed on the ground that it “fails to state facts sufficient to constitute a cause of action.”
   2. “…he has stated with enough to withstand a mere formal motion, directed only to the face of the complaint…Under the new ruled of civil procedure, there is no pleading requirement of stating ‘facts sufficient to constitute a cause of action,’ but only that there be ‘a short and plain statement of the claim showing that the pleader is entitled to relief’…”
   3. “…we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting.”
2. ***Conley v. Gibson, USSC, 1957* (pages 199-201)**
   1. Complaint by black railroad workers that they were required to join a union, but then segregated and treated unequally but that union. Motion to dismiss on 12(b)(6) and a vague referral to 12(e).
   2. With respect to 12(b)(6): “[W]e hold that…the complaint adequately set forth a claim on which relief could be granted…a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”
   3. With respect to 12(e): “The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”
3. ***Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, USSC, 1992* (pages 202-203, notes 2-3)**
   1. Civil rights case brought against law enforcement officials who had ransacked the home of a black family, shot and killed pets, and celebrated it, not finding anything relevant to their investigation.
   2. Some lower federal courts (specifically Fifth Circuit in this case) had been trying to impose a stricter pleading standard in some types of cases, including civil rights, and also cases against state actors in their individual capacities. Also supported lower court’s dismissal of claims based on 12(b)(6), a motion that defendant had not brought.
   3. “We think it is impossible to square the ‘heightened pleading standard’ applied by the Fifth Circuit in this case with the liberal system of ‘notice pleading’ set up by the Federal Rules…that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”
   4. Reaffirms *Conley*.
4. ***Swierkiewicz v. Sorema N. A., USSC, 2002* (CM 2-10; page 203, note 4)**
   1. Employment discrimination suit based on nationality and age. Plaintiff a Hungarian ex-employee of defendant, a French company. Plaintiff alleges that his French boss demoted him and transferred the bulk of his responsibilities to a younger, less experienced French national. Plaintiff complained and was fired after refusing to resign.
   2. Lower courts, in spite of *Leatherman*, were still attempting to impose a heightened pleading standard for civil rights cases. Case was initially dismissed in lower courts on grounds that petitioner failed to plead a prima facie case of discrimination, referring to a case *McDonnell Douglas Corp. v. Green*.
   3. “The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement…The Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.”
   4. Cites and reaffirms *Conley* and *Leatherman*.
5. ***Dura Pharms, Inc. v. Broudo, USSC, 2005* (from class; page 203, note 5)\***
   1. Private Securities Litigation Reform Act (PSLRA); heightened pleading standard in federal securities cases.
6. ***Tellabs Inc., v. Makor Issues & Rights, Ltd., USSC, 2007* (from class)\***
   1. Prison Litigation Reform Act (PLRA); heightened pleading standard for prison cases.
7. ***Bell Atlantic Corp. v. Twombly, USSC, 2007* (pages 205-221)**
   1. This is an anti-trust case under the Sherman Act, which requires a “contract, combination…or conspiracy, in restraint of trade or commerce.” Issue is whether or not a “complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.”
   2. “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do…Factual allegations must be enough to raise a right to relief above the speculative level.”
   3. “[R]equires a complaint with enough factual matter (taken as true) to suggest that an agreement was made…does not impose a probability requirement…calls for enough fact to raise a reasonable expectations that discovery will reveal evidence of an illegal agreement…requirement of rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”
   4. “‘Conley has never been interpreted literally’…‘[i]n practice, a complaint…must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory’…”
   5. “[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”
   6. Does not reject previous decisions or Form 11, and claims not to endorse “heightened pleading.”
   7. Dissent: “…‘plausibility’ standard is irreconcilable with Rule 8 and with out governing precedents.”
   8. Notes 9-10, page 222; Documents filed *pro se* (without a lawyer) must be held less stringent standards and courts are typically more forgiving when plaintiffs have no legal representation, so maybe *Conley* still applies in such cases.
8. ***Ashcroft v. Iqbal, USSC, 2009* (CM 11-16)**
   1. Post-9/11 race discrimination case.
   2. “Did respondent, as the plaintiff of the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent’s pleadings are insufficient.”
   3. “*Twombly* called for ‘flexible “plausibility standard,” which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.’”
   4. Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation…Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’”
   5. “First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a course of action, supported by mere conclusory statements do not suffice…we ‘are not bound to accept as true a legal conclusion couched as a factual allegation’…”
   6. “…two-pronged approach…plaintiffs’ assertion of an unlawful agreement was a ‘“legal conclusion”’ and, as such, was not entitled to the assumption of truth…next addressed the ‘nub’ of the plaintiffs’ complaint—the well-pleaded, nonconclusory factual allegation of parallel behavior—to determine whether it gave rise to a ‘plausible suggestion of conspiracy,’ [using] judicial experience and common sense.”
   7. “Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—structures of Rule 8.”
   8. Extended *Twombly* to all pleadings, striking down argument that it and *Iqbal* only applied to specific cases or types of cases.

SUMMARY:

1. **Current state:** We are clearly in a period of flux with respect to notice pleading. Rule makers are actively considering changing the rules, however, recent pleading decisions have had very little effect of litigation, really only affecting unusual cases.
2. **Purpose:** Rule 8 is the default unless: 1) there is a more specific rule; or 2) congress passes a law indicating otherwise. Pleadings should simply give notice to the other side as to what the case is about. Rule makers sought to facilitate decisions based on the merits, and to do away with hypertechnical pleading requirements. There are two camps: 1) 12(b)(6) is really only meant to weed out cases in which no legal justification is recognizable; and 2) pleadings should be used as a more aggressive filter to weed out meritless cases.
3. **Current rule:** In evaluating the sufficiency of a complaint, the court may look only to the “four corners of the complaint,” and must assume true any factual allegations asserted by the plaintiff. (Does the complaint “on its face” show a lack of legal cause?) *Twombly*/*Iqbal* two-step: 1) strike all conclusory allegations; then, 2) evaluate remaining factual allegations on the basis of plausibility, using “judicial experience and common sense.” (Conclusory is basically parroting terminology needed for a cause of action, but with no factual support. The standard of plausibility is probably akin to the standard at summary judgment, i.e. we only take cases away when, based on the information, if a jury ruled one way it would be unreasonable.) Could you infer a cause of action based on the remaining facts?
4. **Ways a claim can be insufficient:** 1) No cause of action exists; 2) a cause of action may exist, but has not been plead; or 3) the pleader has “plead themselves out of court.”

POLICY CONSIDERATIONS:

1. Relaxed pleading standards do not facilitate the purpose of screening out claims that lack merit. Strict pleading standards dismiss some meritorious cases (i.e. “burning the wheat with the chaff”).
2. Relaxed standards invite potentially expensive discovery and may encourage innocent defendants to settle just to avoid exorbitant costs. Further, plaintiffs could potentially abuse discovery simply to gather information for other purposes. Strict standards invite dismissals, even in the presence of informational imbalances that my only be corrected during the discovery phase.
3. Perhaps with certain allegations you cannot say more (with respect to conclusory) or that you cannot say more without discovery. (“Shifts false positives to false negatives.”)
4. Instead of dismissal, plaintiff could be allowed to amend.

STRATEGY CONSIDERATIONS:

1. Hypo: Say a bystander saw a wreck and suffered emotional distress with no physical injury, but that physical injury is a requirement for cause of action. You could file a 12(b)(6) motion, but your opponent would likely amend or re-file with a claim including injury. In this case, it may be wiser to wait until discovery, prove that there was no injury, and then file a motion to dismiss.
2. Two things that may deter or stop a plaintiff from re-filing: 1) statutes of limitations; and 2) you get the same judge every time.
3. A plaintiff will not want to give away too much information in their complaint, for caution of exposing strategic arguments.

PRE-TRIAL MOTIONS

APPLICABLE RULES:

1. **Rule 12 (pages 92-94)**
2. **Rule 12(b) (page 93):** “**How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:(1) lack of subject-matter jurisdiction;(2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under [Rule 19](http://www.law.cornell.edu/rules/frcp/Rule12.htm#Rule19). A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.”
3. **Rule 12(c) (page 93):** “**Motion for Judgment on the Pleadings.** After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.”
4. **Rule 12(e) (page 93):** “**Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.**”**
5. **Rule 12(g) (page 93):** “**Joining Motions. (1) *Right to Join*.** A motion under this rule may be joined with any other motion allowed by this rule. **(2) *Limitation on Further Motions*.** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.”
6. **Rule 12(h) (page 93-94):** “**Waiving and Preserving Certain Defenses.** **(1) *When Some Are Waived*.** A party waives any defense listed in Rule 12(b)(2)-(5) by: (A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or (B) failing to either:(i) make it by motion under this rule; or (ii) include it in a responsive pleading or in an amendment allowed by [Rule 15(a)](http://www.law.cornell.edu/rules/frcp/Rule12.htm#Rule15_a_)(1) as a matter of course. **(2) *When to Raise Others*.** Failure to state a claim upon which relief can be granted, to join a person required by [Rule 19(b)](http://www.law.cornell.edu/rules/frcp/Rule12.htm#Rule19_b_), or to state a legal defense to a claim may be raised: (A) in any pleading allowed or ordered under [Rule 7(a)](http://www.law.cornell.edu/rules/frcp/Rule12.htm#Rule7_a_); (B) by a motion under Rule 12(c); or (C) at trial. **(3) *Lack of Subject-Matter Jurisdiction*.** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”
7. **Rule 15(a)(1):** “**Amending as a Matter of Course.** A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under rule 12(b), (e), or (f).”

RELEVANT CASES:

1. ***Bower v. Weisman, S.D.N.Y., 1986* (pages 223-229)**
   1. **Motion for a more definite statement** granted when case had multiple defendants and complaint employed the term “defendant” in several places, without specify which particular defendant was referred to. “Obviously Weisman cannot effectively respond to Bower’s complaint until he knows which claims Bower is asserting against him in his individual capacity.”
   2. “A motion pursuant to **12(e)** should not be granted ‘unless the complaint is so excessively vague and ambiguous as to be unintelligible and as to prejudice the defendant seriously in answering it.’”
   3. “Rule **9(b)** does not render Rule 8 meaningless in **fraud** cases. The two rules must be read in conjunction with each other.”
   4. “‘[**A well-pleaded claim of fraud**] normally includes the time, place, and content of the false representations, the facts misrepresented, and the nature of the detrimental reliance…’”
   5. Note 4 (page 228): Rule **8(d)(3)** provides that a party may state as many **separate claims** or defenses as it has, *regardless of consistency.*
   6. Note 8 (page 229): Rule **9(g)** requires that “if an item of **special damages** is claimed, it must be specifically stated.”

EXERCISES:

1. **Carpenter v. Dee (pages 229, 1007-1016)**
   1. **12(e)** motion for a more definite statement
      1. **Generally vague?** Struck down. *Twombly* and *Iqbal* have had very little impact on 12(e) standards. It doesn’t take much to inform the other party. There must be a real deficiency in the claim. Does the pleading give you opponent the information he needs to answer and mount a defense?
      2. No specific amount claimed in **damages**? Struck down Typically you do not plead a specific amount, except in the case of special damages, which are damages that do not typically flow from this type of injury. You must plead these out of fairness to the defendant so he is not caught off guard.
   2. **12(b)(6)** motion to dismiss for failure to state a claim
      1. Defendant not owner of vehicle. Who cares? You can still be negligent without being the owner. This argument had no legal foundation.
      2. **Fails to allege a duty owed.** Technically, this should have been pled, but the law will imply a duty on a driver anyway. It would have been better to specifically allege a duty, just to avoid problems. There are cases where allegation of a duty would be necessary.
      3. **Fraudulent conveyance not pled with particularity.** Fraudulent conveyance here is different than fraud in rule 9(b). (See statute; page 1006, section 7.) In this case intent doesn’t matter.
2. **Flannel v. J.C. Penney (pages 333-334)**
   1. 12(b)(6) motion on a complaint for malicious prosecution.
   2. Will the complaint be dismissed?
   3. Probably. Plaintiff fails to give facts that support malice, one of the three elements of malicious prosecution.

WAIVER RULES:

* + - 1. **Least favored defenses:** 12(b)(2)-(5). Rule 12(h)(1) applies. Waived by leaving them out of a prior Rule 12 motion (either pre-answer or in the answer), not making a Rule 12 motion at all (either pre-answer or in the answer), or leaving them out of an amended answer.
      2. **More favored defenses.** 12(b)(6)-(7) (also objection to failure to state a legal defense). Rule 12(h)(2) applies. Can be pled in pre-trial motion, any pleading under 7(a) (page 80; 7(a) includes answer as a pleading), a motion under 12(c), or at trial. (12(c) motion is used when, after the pleadings, it is clear that one party or the other should win.)
      3. **Most favored defense.** 12(b)(1). Rule 12(h)(3) applies. Can be filed at any time. Can also be determined and dismissed at any time by the court. Right to subject matter jurisdiction cannot be waived. Judge gets independent responsibility to ensure subject matter jurisdiction.
      4. **12(e):** Must be filed before a responsive pleading.

POLICY CONSIDERATIONS:

1. Why is subject matter jurisdiction the most favored defense? Probably because it can reasonably be realized at any stage of trial. Also because subject matter jurisdiction is a big matter that affects the entire federal judiciary.
2. What is the reasoning behind the least favored defenses? These are things the defendant should have realized toward the beginning if he were reasonably diligent. No reason to waste time or resources later on. Furthermore, these are single person issues that will likely have a minimal effect on the entire judiciary.

STRATEGY CONSIDERATIONS:

1. Rule 12(g)(2) prohibits only further motions for defenses that were available but omitted. Is a defense “available” to you if you are not aware of it?
2. Rule 15(a) allows a plaintiff to amend her pleading in one of several time windows. Before the 2009 Amendments, a responsive pleading would cut off the plaintiff’s right to amend, but this is no longer the case (casebook is outdated).
3. Waiting to raise a 12(b)(6) until it is too late for the plaintiff to cure an omission.

ANSWERS

3 CHOICES IN RESPONDING TO A COMPLAINT:

1. **Do nothing:** You will be found in default and will waive you right to argue the merits of your case. However, you can collaterally attack personal jurisdiction.
2. **Answer:** This is a general appearance. You will get to argue on the merits, but waive your right to challenge personal jurisdiction.
3. **Other options:** Rule 12 motions, remove to federal court, etc.

FOUR TYPES OF MATERIAL AND OTHER CONCERNS IN ANSWERS:

1. Admissions and denials to the averments in the plaintiff’s complaint.
2. 12(b) defenses.
3. Affirmative defenses.
4. Counterclaims and cross-claims.
5. Other concerns: 1) whether to implead a third party of otherwise seek to add parties, or to reduce the number of parties; and 2) whether to claim a jury trial.

ADMISSIONS AND DENIALS:

**Rule 8(b) (page 82):**

(b) **Defenses; Admissions and Denials.**

1. ***In General.*** In responding to a pleading, a party must:
2. state in short and plain terms its defenses to each claim asserted against it; and
3. admit or deny the allegations asserted against it by an opposing party.
4. ***Denials—Responding to the Substance.*** A denial must fairly respond to the substance of an allegation.
5. ***General and Specific Denials.*** A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those admitted.
6. ***Denying Part of an Allegation.*** A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.
7. ***Lacking Knowledge or Information.*** A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.
8. ***Effect of Failing to Deny.*** All allegation—other that one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.
9. **Requires admission or denial of each averment**.
10. All pleadings are subject to Rule 11.
11. In a responsive pleading **allegations not denied will be deemed admitted**. When no responsive pleading is required, “an allegation is considered denied or avoided.”
12. **Once something is admitted, it will be deemed true for the rest of the trial**. Admissions in pleadings are more binding than evidence given at trial.
13. A party may deny individual averments in a complaint or entire sections of the complaint, but there are **penalties for denying an entire group of averments when in fact the pleader denies only a portion (and could admit the remainder)**. Rule 11 sanctions apply, or (in extreme cases) defendant could be treated as admitting certain statements in a complaint.
14. If a party “lacks knowledge or information sufficient to form a belief,” it may so state, at the statement will be considered a denial. (“**Lack knowledge and therefore deny**.”) Some courts, however, have insisted that a party must make a reasonable inquiry prior to admitting or denying averments, and therefore, in the absence of such inquiry, may treat such a denial as and admission.
15. **Denial upon “information and belief”** (not expressly authorized by 8(b)), may be asserted by a party who lacks first-hand or personal knowledge of the validity of one or more of the allegations in the preceding pleading, but who has sufficient information to form a belief concerning the truth or falsity of those allegations.

AFFIRMATIVE DEFENSES:

**Rule 8(c) (pages 82-83):**

(c) **Affirmative Defenses.**

(1) ***In General.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defenses, including:

* accord and satisfaction;
* arbitration and award;
* assumption of risk;
* contributory negligence;
* discharge in bankruptcy; [deleted in amendment, effective 12/1/10]
* duress;
* estoppel;
* failure of consideration;
* fraud;
* illegality;
* injury by fellow servant;
* laches;
* license;
* payment;
* release;
* res judicata;
* statute of frauds;
* statute of limitations; and
* waiver.

(2) ***Mistaken Designation.*** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

1. Affirmative defenses are the counterpart to the “**confession and avoidance**” of the common law. In effect, the defendant is saying, “Even if you prove your cause of action” (i.e., the confession), “I still win because of another rule or an exception” (i.e., the avoidance).
2. **Defendants have the burdens** of pleading, production, and persuasion as to all elements of the affirmative defense, just as plaintiffs usually have the same burdens as to the elements of their cause of action.
3. Rule 8(c) lists 19 matters as affirmative defenses, but is clear that the **list is not all-inclusive**.
4. It used to be commonplace that **failure to list an affirmative defense in the answer** would mean that the defendant has waived it. Some circuit courts, however, have concluded that a defendant does not waive an affirmative defense by failing to raise it in the answer, absent a showing of prejudice to the plaintiff, typically with defenses not listed in 8(c).
5. **Occasionally the burdens are shifted**, e.g. when a plaintiff proves triggering facts in a case where negligence is presumed and the defendant must disprove it, or for nonpayment of a promissory note where the defendant must show proof of payment.

STRATEGY CONSIDERATIONS:

1. Every defense must be asserted in an answer, but 12(b) motions must be asserted, at the latest, in your answer (but preferably before), or otherwise may face consequences of waiver.
2. A party may want to withhold some available motions or defenses in order to avoid pointing out a weakness in the other side’s argument.

SANCTIONS

RULE 11 (SUMMARY) (PAGES 86-87):

1. **Signature.** Every pleading, written motion and other paper must be signed by an attorney (or by the part himself if he is unrepresented.)
2. **Representations to the Court.** Presenting a paper (by signing, filing, submitting, or later advocating) one certifies a good faith believe after reasonable inquiry that:
3. it is not being used for an improper purpose (malicious litigation, cost increase, etc.);
4. the legal contentions asserted are warranted by law or a nonfrivolous argument for modifying current law;
5. the factual contentions have evidentiary support or, if specifically marked, are likely to have evidentiary support after further investigation; [wiggle room; may save you from sanctions, but not necessarily from rule 8]
6. the denials of facts are warranted by evidence or, if so marked, by lack of knowledge.
7. **Sanctions.**
8. ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, it may impose an appropriate sanction against a party, attorney, or law firm responsible for the violation.
9. ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that violates Rule 11(b). Once it is served, the party has 21 days to correct the behavior before it can be files with the court.
10. ***On the Court’s Initiative.*** On its own, the court may order a side to show why their conduct has not violated Rule 11(b).
11. ***Nature of a Sanction.*** Sanctions are only used for deterrence, and are limited as such.
12. ***Limitations on Monetary Sanctions.*** A court cannot impose monetary sanctions:
13. against a represented party for violating 11(b)(2); or
14. own its own, unless it issued order under 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the side to be sanctioned.
15. ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for he sanction.
16. **Inapplicability to Discovery.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under rules 26-37. [Rule 37 applies to discovery.]

HISTORY OF RULE 11:

1. **1938-1983:** Unchanged. “Blinking yellow light.” 19 Rule 11 Cases; 11 violations found; 3 sanctions imposed.
2. **1983-1993:** 1970s, first substantial reporting of litigation abuse, increase in litigation due to Congress making the law more accessible; critiques – perceived concerns of discovery abuse, plaintiffs’ lawyers billing by the hour, etc; 1983, calls for reform resulted in mandatory sanctions, tightening of language, “well grounded in fact.”
3. **1993 (current version):** By 1993 many courts thought the pendulum had swung too far the other way. Sanctions became a sword the other side was all too willing to use. Spawned satellite litigation, even Rule 11on Rule 11 litigation. Plaintiffs suffered disproportionately, so did civil rights cases. Perception that the rule was being unfairly applied. Deterring litigation, punishing plaintiff. Amended in 1993.

HOW IS CURRENT VERSION LESS RESTRICTIVE?

1. **Safe harbor clause in 11(c)(2):** You give 21 days for the other side to “come to Jesus.” Exception: if the judge sua sponte orders a show cause hearing under 11(c)(5). (The only way to avoid this is to withdraw the offending document before an order is issued for a show cause.)
2. **Looser language in 11(b)(3):** Replaces “well-grounded” with “evidentiary support” or “likely to have.”
3. **Imposition of sanctions discretionary under 11(c)(1).**
4. **Fee shifting/compensation is not the purpose.** Sanctions are typically paid to the court, not to the opponent.
5. **Limited to deterrence, not punitive. Rule 11(c)(4).**

HOW IS CURRENT VERSION MORE RESTRICTIVE?

1. **Can be imposed against law firms** employing attorneys in violation, Rule 11(c)(1).
2. **Continuing obligation**, i.e. you must withdraw at any time you realize you are in violation.
3. **Only applies to documents** or later advocating with reference to a document, Rule 11(b).

OTHER NOTES:

1. May not want to use 11(b)(3) and point out arguments that don’t have evidentiary support. This could tip off the other side to file 12(b)(6) or to attack a weak argument.
2. Rule 11 does apply to itself.
3. 2005 Lawsuit Abuse Reduction Act; wanted to revert to 1983 version and to apply Rule 11 to state courts; failed in Congress.
4. ***Chaplin v. DuPont, District Court, Eastern District of Virginia, 2005* (pages 288-292)**
   1. A group of DuPont employees were required to remove all Confederate flags from their vehicles, clothing, etc. They subsequently filed a suit for employment discrimination based on national origin, religion, and race. Prior to dismissal based on 12(b)(6) DuPont served them with a Rule 11 motion for sanctions. When the plaintiffs failed to withdraw their claims, DuPont filed for sanctions.
   2. “First, the complaint must be filed for a proper purpose. Second, each count of the complaint must have a sufficient basis in law. And third, each of the claims must have a sufficient basis in fact.”
   3. “Creative claims, coupled with even ambiguous or inconsequential facts, may merit dismissal, but not punishment.”
   4. “An argument that has absolutely no chance of success under the existing precedent may be actionable,” but “the precedent precluding the claim must be authoritative.”
   5. Sanctions were imposed on the religious and racial discrimination claims, but not on the national origin claims. 4th Circuit reversed the sanctions, saying that “although a claim may be so inartfully pled that it cannot survive a motion to dismiss, such a flaw will not in itself support Rule 11 sanctions—only the lack of any legal or factual basis is sanctionable.”
5. Justice Scalia wrote a strong dissent to accompany the adoption of the 1993 version of Rule 11.
6. **Non-monetary sanctions available include:** (1) striking the offending paper, (2) issuing an admonition, (3) requiring participation in seminars or other educational programs, (4) referring the matter to disciplinary authorities.

AMENDMENTS

WILL AN AMENDMENT BE ALLOWED (BEFORE TRIAL)? RULE 15(a):

1. ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:
2. 21 days after serving it, or
3. if the pleading is one to which a responsive pleading is required, 21 days after of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), of (f), whichever is earlier.

Notes:

1. Service of a responsive pleading is different than service of a complaint. Under 4(m) service of a complaint gets 120 days after it is filed; service of a responsive pleading is just filing it with the court.
2. ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.

Notes:

1. If amendments are always allowed, the complaint will become a moving target, and it at some point becomes unfair to the other side, especially to new defendants added. (Less discovery, death of witnesses, degeneration of evidence.)
2. 15(a)(1) is a freebie. If you lost or used your freebie, you can ask the other side to allow your amendment, or ask the judge to approve it—if justice so requires. (Usually the other side approves—Why be a jerk when the judge will just grant anyway? Sometimes it is even favorable to allow a new defendant to be brought in.)
3. How as “justice requires” been evaluated? Only time not to give leave is then specific prejudice would result. General inconvenience is not enough. Undue delay alone is not enough unless it leads to undue difficulty in defending lawsuit. Specific prejudice must be shown.
4. Who do you ask on the other side for permission? Existing parties. No prejudice analysis here. (This side will just say no if it feels prejudiced.) New parties cannot object.
5. P may have to explain why it took them so long to file. (This will make you look better, even if you don’t technically need it.)
6. 3 typical arguments for why justice does not require:
   1. unreasonable delay (usually fails as an argument alone)
   2. you have been prejudiced by the delay
   3. the new issue is raised in bad faith
   4. the new issue is futile

RELATION BACK, RULE 15(c):

Note: Vast majority of amendments never worry about 15(c). It is only needed to save you (i.e. “to revive a dead claim”). This rule is not even considered until an amendment is allowed under 15(a). 15(c) must be raised as an affirmative defense in order to be considered.

1. ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:
2. the law that provides the applicable statute of limitation allows relation back;

Notes:

1. “Borrowing rule” or “choice of law rule”. A claim would have specifically been timely under law, as provided by the law that imposes the statute of limitations.
2. Sometimes other circumstances can stop the clock on SOL, e.g. the “discovery rule,” incapacity, etc.
3. the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

Notes:

1. “Same conduct, transaction or occurrence” is not the same standard throughout the Rules. It applies with different considerations to different rules. For instance, in Rule 20 a broad interpretation is appropriate because parties can always be separated if joinder is found to be inappropriate. A narrower interpretation is appropriate in Rule 15, because it revives a dead claim that legislation has already barred for certain policy reasons, memories, fade, evidence rots, we want peace of mind.
2. the amendment changes the party or the naming of the party against whom a claim is asserted, if rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) [120 days with leave to extend] for serving the summons and complaint, the party to be brought in by the amendment:
3. received such notice of the action that it will not be prejudiced in defending on the merits; and
4. knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party’s identity.

Notes:

1. Notice does not have to be formal. It does have to be notice *of the suit*.
2. Not whether P should have known the proper party’s identity, but whether D should have realized the error.
3. ***Christopher v. Duffy, Mass. App. Ct., 1990* (pages 259-260)**
   1. Plaintiffs sued Duffy and others after wife died due to exposure to lead paint due to shoddy work when Duffy was to “delead” the apartment. Originally Duffy was sued as a John Doe, but was named in the first amended complaint. Plaintiffs moved to file a second amended complaint, dropping all other defendants and naming five paint companies, alleging dangerous products and relying on relation back. The motion was denied.
   2. “Amendment such as that proposed here—adding a party, sounding a new theory of liability, but claiming a remedy for the injury first sued on—should be allowed with relation back, unless there is good reason to deny it…the court decides whether a reason is good, and therein is bound to exercise a sound discretion.”
   3. “We assume, as did the judge below, that permission to amend turns, in discretion, on whether the opposing party will be unduly prejudiced by allowance of the amendment, recognizing, however, that delay may contribute, and even contribute seriously, to cause the prejudice. We assume, too, that it is up to the opposing party to point to the prejudice, whether that is apparent or requires demonstration.”
   4. “This is not the common case of a proposed amendment which will, if allowed, expose an existing party to a new theory of liability. Here we have parties, previously unconnected with the case, who are served long after the running of the relevant statute of limitations. The policies which support the extinguishment of claims after limitations periods speak against allowing such amendments against new defenants.”

CASES:

1. ***Swartz v. Gold Dust, District Court, Nevada, 1981* (CM 31-34)**
   1. Woman sued Gold Dust for a fall down a stairs, claiming negligent maintenance of the stairwell, and seeks to add a complaint for negligent construction against the owner, Cavanaugh Properties. Owner of the property was also the manager of the casino. Defendants claimed that the maintenance and construction were two different legal theories and two separate negligent acts, and so the construction should not relate back. Court allowed relation back.
   2. “Three requirements, (1) the claim asserted in the amended pleading must have arisen from the conduct, transaction or occurrence set forth in the original pleading; (2) the new defendant must have received notice of the action within the limitations period; and (3) the new defendant should have know that but for a mistake concerning the identity of the proper party, the action would have been brought against him.”
   3. “Arose out of the same occurrence ser forth in the original complaint, namely the fall.”
   4. “The two acts alleged were but different invasions of appellee’s primary right and different breaches of the same duty. There was but one injury and it is immaterial whether it resulted from the negligence of the users of the scaffold or from its construction, since in either case it was a violation of the same obligation.”
   5. “If a person who receives notice of the legal action within the limitations period should know from the information received that he may be liable to the plaintiff by reason of the claim for relief asserted against another, he has received the notice required by the rule.”
   6. “A lack of diligence…is insufficient to prevent him from seeking to amend, in the absence of purposeful delay or bad faith….Undue difficulty in defending the lawsuit by reason of the passage of time would be prejudicial…Specific prejudice must be shown.”
2. ***Mayle v. Felix, USSC, 2005* (CM 35-52)**
   1. A prisoner convicted of murder claims his constitutional rights were violated during trial. His original claim asserted violation of his Sixth Amendment rights when he was not allowed to confront a witness. After the statute of limitations had run he sought to add a Fifth Amendment claim that the police beat him in order to get a confession. Relation back was not granted.
   2. Habeus if pled as a civil matter when one objects to his or another’s detention or death sentence. It is a civil review of whether there was a legal or factual error at trial. AEDPA instates a one-year statute of limitations in to encourage the finality of sentencing.
   3. “While an amendment offered to clarify or amplify the facts already alleged in support of a timely claim may relate back, an amendment that introduces a new legal theory based on facts different from those underlying the timely claim may not.”
   4. “They allow relation back only when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in both time and type from the originally raised episodes.”
   5. “Relation back depends on the existence of a common core of operative facts uniting the original and newly asserted claims.”
   6. *Tiller-*Wrongful death of a railroad worker killed by a railroad car. Wife’s original complaint alleged various negligent acts. She later sought to add lack of a rear light under the Federal Boiler Inspection Act. Allowed to relate back.
      1. “But one episode-in-suit.”
      2. Same duty; reasonably safe place to work.
   7. Trial does not relate the claims as the same “transaction” or “occurrence.” “Each separate congeries of facts supporting the grounds for relief, the Rule suggests, would delineate an occurrence.”
3. ***Krupski v. Costa Crociere, USSC, 2010* (CM 52a-52j)**
   1. Passenger injured on a cruise. Confused by the language on her ticket, plaintiff sued the Florida company Costa Cruise, daughter of Costa Crociere, the proper company to be sued. Upon motion for summary judgment by Costa Cruise, plaintiff amended to add Costa Crociere after the SOL had passed. Costa Crociere’s existence had not been made know to the plaintiff until after the SOL had passed. Defendants contend that “mistake” should not be construed to encompass a deliberate decision not to sue a party whose identity the plaintiff knew before the statute of limitations had run. They claim ticket “clearly indentified Costa Crociere as the carrier” and the plaintiff should have known of their identity as a potential party.
   2. “The question is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error.” Rule asks what defendant knew or should have known, not what plaintiff knew or should have known.
   3. “It would be an error to conflate knowledge of a party’s existence with the absence of a mistake. A mistake is an error, misconception, or misunderstanding; an erroneous belief…That a plaintiff knows of a party’s existence does not preclude her from making a mistake with respect to the party’s identity…The reasonableness of the mistake is not itself at issue.”
   4. “We agree that making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party’s identity.”

JOINDER OF CLAIMS

FRCP 18 (PAGE 115):

**Joinder of Claims**

1. **In General.** A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party
2. **Joinder of Contingent Claims.** A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

FRCP 13 (PAGE 98):

**Counterclaim and Crossclaim**

1. **Compulsory Counterclaim.**
2. ***In General.*** A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim:
3. arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
4. does not require adding another party over whom the court cannot acquire jurisdiction.
5. ***Exceptions.*** The pleader need not state the claim if:
   1. when the action was commenced, the claim was the subject of another pending action; or
   2. the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.
6. **Permissive Counterclaims.** A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(e) **Counterclaim Maturing or Acquired After Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(g) **Crossclaim Against a Coparty.** A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) **Joining Additional Parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

FRCP 14 (page 100):

(a) **When a Defending Party May Bring in a Third Party.**

(1) **Timing of the Summons and Complaint.** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

(2) **Third-Party Defendant's Claims and Defenses.** The person served with the summons and third-party complaint — the “third-party defendant”:

1. must assert any defense against the third-party plaintiff's claim under [Rule 12](http://www.law.cornell.edu/rules/frcp/Rule12.htm);
2. must assert any counterclaim against the third-party plaintiff under [Rule 13(a)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_a_), and may assert any counterclaim against the third-party plaintiff under [Rule 13(b)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_b_) or any crossclaim against another third-party defendant under [Rule 13(g)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_g_);
3. may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and
4. may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.
5. **Plaintiff's Claims Against a Third-Party Defendant.** The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under [Rule 12](http://www.law.cornell.edu/rules/frcp/Rule12.htm) and any counterclaim under [Rule 13(a)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_a_), and may assert any counterclaim under [Rule 13(b)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_b_) or any crossclaim under [Rule 13(g)](http://www.law.cornell.edu/rules/frcp/Rule14.htm#Rule13_g_).
6. **Motion to Strike, Sever, or Try Separately.** Any party may move to strike the third-party claim, to sever it, or to try it separately.
7. **Third-Party Defendant's Claim Against a Nonparty.** A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(b) **When a Plaintiff May Bring in a Third Party.** When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

WHEN CLAIMS CAN BE JOINED:

* + 1. A party may join as many independent or alternative claims as it has against an opposing party (even if they are totally unrelated).
    2. Claims may be separated by the court under 42(b) for convenience, to avoid prejudice, for economy, etc.

WHEN CLAIMS MUST BE JOINED:

* + - 1. **Common Law Doctrines of Preclusion:**
         1. Claim preclusion (res judicata); a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action (can’t try the same case twice).
         2. Issue preclusion (collateral estoppel); once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case; first judgment (with respect to a particular defendant) extinguishes all claims that could have been brought out of the same transaction or occurrence.

COUNTERCLAIMS:

1. **Compulsory counterclaims:** A counterclaim is required if it arises out of the same transaction or occurrence as the original claim.
2. **Permissive counterclaims:** A party may bring as many claims as he wishes against an opposing party, related or not.
3. ***Podhorn v. Paragon Group, D. Mo. 1985* (pages 307-308)**
   1. Plaintiffs had been sued by landlord in a state court for rent due. They later sued the landlord in federal court over many issues relating to their eviction form their apartment. The defendants moved to dismiss on the grounds that this was a compulsory counterclaim that the plaintiffs failed to file in the state suit. The court agreed, although the plaintiffs argued that it was not compulsory since the state court did not have jurisdiction to hear cases involving their level of damages.
   2. “The Court finds plaitiffs’ claims in this case arise out of the transaction or occurrence that gave rise to Paragon’s rent action in the earlier state court case, namely plaintiffs’ tenancy at defendant’s apartment. Accordingly, plaintiffs were required to file instant claims as compulsory counterclaims and their failure to do so bars them from having those claims heard.”
   3. “In the event that the counterclaim is not triable before an associate circuit judge…the case is to be certified for assignment to a judge who may hear the claim…plaintiffs were not relieved of their obligation to file it.”
   4. Note 1. Four tests for “transaction or occurrence”:
      1. Are the issues of fact and law largely the same?
      2. Would res judicata bar a subsequent suit?
      3. Will substantially the same evidence be relevant?
      4. Is there a logical relation?
   5. Class notes:
      1. Moral: Always try. (E.g. in a federal case under diversity jurisdiction where the counterclaim is only for $20,000.)
      2. Probably an unusual decision. Maybe courts would not use waiver.
      3. Each claim must have an independent basis for subject-matter jurisdiction. If not, courts could either say it is not compulsory, or that it is compulsory but they will except the waiver rule.
      4. Supplemental jurisdiction: Counterclaim does not have to have its own basis for subject matter jurisdiction as long as it is transactionally related.

CROSSCLAIMS:

1. Cross-claims must be closely (transactionally) related to at least one claim in the action. Once a party has asserted a transactionally related crossclaim, however, it may assert unrelated claims under Rule 18.
2. Crossclaims are not compulsory. They are not barred by res judicata or collateral estoppel.
3. Distinction between claim and defense; must be sufficient for relief; finger-pointing not enough; must have own damages; otherwise only a defense; only claims are allowed under crossclaims (and third-party claims).

THIRD-PARTY CLAIMS:

1. Under Rule 14 a defendant may implead a person not already a party to the action who is purportedly liable to the defendant for all or part of the defendant’s liability to the plaintiff. (Can only bring in third party if they would be liable to D in the event that D is liable to P. If D wins, then the claim is severed.)
2. ***Gross v. Hanover Ins. Co., SDNY, 1991* (pages 311-313)**
   1. Insurance company moved to implead employees of a jeweler who left the safe open and unattended, resulting in the subsequent robbery, on the grounds that the employees would be liable to the insurer in the event that the insurer was found liable to the store.
   2. “The purpose of this rule is to promote judicial efficiency by eliminating the necessity for the defendant to bring a separate action against a third individual who may be secondarily or derivatively liable to the defendant for all or part of the plaintiff’s original claim.”
   3. The “claims arise from the same aggregate or core of facts which is determinative if the plaintiff’s claim, and thus the interest in judicial economy would be served by permitting those claims to proceed in the instant action.”
   4. “The words ‘is or may be liable’ make it cleat that impleader is proper even though the third-party defendant’s liability is not automatically established once the third-party plaintiff’s liability to the original plaintiff has been determined.”
   5. Note 1: Three conditions must be met in order to implead a third party:
      1. Not already a party.
      2. Defendant must have a claim against party.
      3. Must be potentially liable to D for all or part of *P’s specific claim against D****.***
   6. Note 2: Impleader is allowed only if the third-party claim is in some way dependent on the main claim. It is not allowed for the defendant to assert a separate and independent claim even though the claim arises out of the same general set of facts as the main claim. Once a valid third-party claim has been established, however, expansiveness is allowed under Rule 18.
   7. Note 3: Usual pleading and counterclaim rules apply. See Rule 14 for additional rules of expansiveness with respect to the original plaintiff. (E.g. third-party D can bring claims against original P; can claim defenses on behalf of third-party D w.r.t. original claim.)

POLICY CONSIDERATIONS:

1. Want a convenient litigation package. Want to avoid inconveniencing witnesses, entering evidence multiple times, etc.
2. Much more liberal about adding claims because they can always be dropped later. As opposed to relation back, where the courts are essentially ignoring statutes.

JOINDER OF PARTIES

FRCP 19 (PAGE 117):

**Required Joinder of Parties**

1. **Persons Required to Be Joined if Feasible.**
2. **Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
3. in that person's absence, the court cannot accord complete relief among existing parties; or
4. that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
5. as a practical matter impair or impede the person's ability to protect the interest; or
6. leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
7. **Joinder by Court Order.** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.
8. **Venue.** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.
9. **When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
   1. the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
   2. the extent to which any prejudice could be lessened or avoided by:
      1. protective provisions in the judgment;
      2. shaping the relief; or
      3. other measures;
   3. whether a judgment rendered in the person's absence would be adequate; and
   4. whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.
10. **Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state:
    1. the name, if known, of any person who is required to be joined if feasible but is not joined; and
    2. the reasons for not joining that person.
11. **Exception for Class Actions.**
    1. This rule is subject to Rule 23.

FRCP 20 (PAGE 120):

* 1. **Persons Who May Join or Be Joined.**
  2. **Plaintiffs.** Persons may join in one action as plaintiffs if:
     1. they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
     2. any question of law or fact common to all plaintiffs will arise in the action.
  3. **Defendants.** Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if:
     1. any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
     2. any question of law or fact common to all defendants will arise in the action.
  4. **Extent of Relief.** Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.
  5. **Protective Measures.** The court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

WHEN CAN PARTIES BE JOINED:

1. A plaintiff can sue two defendants as long as the claims are transactionally related, unless personal jurisdiction cannot be established (Constitutional right is priority).
2. A court may order separate trials under 20(b).
3. A court may at any time on its own initiative or by motion of a party drop or add a dispensable party.
4. ***Kendra c. City of Philadelphia, E.D. Pa., 1978* (pages 300-305)**
   1. Claims by a family 10 plaintiffs against 15-20 defendants, all employees in various capacities, with the Philadelphia Police Department for events taking place between December 1975 and March 1977. Various plaintiffs were arrested at gunpoint, denied counsel, beaten, detained for lengthy periods, invaded in their homes, threatened, searched warrantlessly, and harassed by various defendants on numerous occasions during this time “in a systematic pattern of harassment.” Defendants fought joinder of parties since the claims addressed events that occurred at different times, over a span, and did not all involve every defendant.
   2. “Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties joinder of claims, parties and remedies is strongly encouraged.”
   3. “Although the events giving rise to the plaintiffs’ claims in this case occurred over a lengthy time period, they are all reasonably related; each of the incidents set forth is encompassed within the ‘systematic pattern’…there is nothing about the extended time span that attenuates the factual relationship among all these events…joinder of defendants in this case is proper.”
   4. The problem of applying 20(b) to avoid prejudice to defendants who were not as involved “will be better to deal with after discover has been completed and the case is ready for trial. At that time, the degree of involvement of each of the defendants will be more clear and potential prejudice will be easier to assess.”

WHEN MUST PARTIES BE JOINED:

Rule 19 – steps:

1. 19(a) – “necessary”

(1)(A) – basically never used

(1)(B) – really the only one ever used

(i) prejudice to the absentee

(ii) prejudice to P or D in the case

1. THEN 19(b) – “indispensible”
   1. If feasible, bring them in.
   2. If not feasible, decide whether to let the case go on, or not. If not, then they are indispensible.
   3. If necessary, most often indispensible.
2. ***Temple v. Synthes Corportation, USSC, 1991* (pages 316-317)**
   1. Plaintiff sued a medical supply company over a plate and screw device that broke off in his lower spine. He did not sue the doctor or the hospital where the surgery was performed. Sythes moved to dismiss for failure to join necessary parties. The court denied the motion.
   2. “It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.”
   3. “A tortfeasor with the usual joint-and-several liability is merely a permissive party to an action against another with like liability.”
   4. Note 3: Necessary status in conferred under 19(a)(1)(A) only if “in that person’s absence, the court cannot accord complete relief among the existing parties.” The inability to collect on a judgment typically will not satisfy the “complete relief” criterion.
   5. Note 4: Necessary status is conferred under 19(a)(1)(B)(i) only if the interests of the absent party would be prejudiced from the adverse effects of a judgment rendered in their absence. Courts typically only recognize “legally protected” interests. This must be more than a financial stake. Joinder is compulsory under 19(a)(1)(B)(i) if the litigation would have a preclusive effect on the absent party in subsequent litigation.
   6. Note 5: “Inconsistent obligations” 19(a)(1)(B)(ii) are not the same thing as inconsistent judgments. An inconsistent obligation, e.g., could occur when one D was ordered to deed Blackacre to A, and another court orders D to deed Blackacre to B.
3. ***Daynard v. Ness, D. Mass., 2001* (pages 320-327)**
   1. Plaintiff is a lawyer who has studied extensively how to defeat the tobacco industry in court. He gave advice to both the Mississippi defendants and the South Carolina defendants but no contract was written for compensation. Plaintiff alleges that one of the Mississippi defendants shook his hand on an agreement for him to receive 5% of all attorney’s fees received by the defendants. Plaintiff sued both defendants and the Mississippi defendants were dismissed for lack of personal jurisdiction. South Carolina defendants move to dismiss for failure to join an indispensible party since the Mississippi defendant allegedly made the handshake agreement. Plaintiff argues that the handshake was the culmination of assurances from both defendants, so they are jointly and severally liable, so only one defendant need be named in the complaint.
   2. Necessary? Rules of thumb:
      1. Joint tortfeasors are not necessary parties.
      2. Co-obligors to a contract may be necessary, but generally are not indispendible. (Co-obligees are traditionally indispensible.)
      3. As a general rule, an action to set aside a contract requires joinder of all parties to the contract.
   3. 19(a)(1): “In ther person’s absence complete relief cannot be accorded among those already parties.” The court held that this factor did not apply because the defendants could be jointly and severally liable under the contract.
   4. 19(a)(2)(i): “The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may as a practical matter impair or impede the person’s ability to protect that interest.” The court held that this factor did not apply because any judgment against the defendants would not bind the absent defendant.
   5. 19(a)(2)(ii): “The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.” The court held that this factor did not apply because the risk of inconsistent *adjudications* is not the same thing as inconsistent *obligations*.
   6. Indispensible?
      1. To what extent might a judgment rendered in the person’s absence be prejudicial to the person or those already parties?
      2. To what extend can the prejudice be lessened or avoided by protective provisions in the judgment, by the shaping of relief, or other measures?
      3. Would a judgment rendered in the person’s absence be adequate?
      4. Would the plaintiff have an adequate remedy if the action is dismissed for nonjoinder?

STRATEGY:

1. Discovery: interrogatories may only be sent to actual parties of the suit.
2. Costs: the more parties and theories, the more discovery the more cost to your client
3. Evidence: different hearsay restrictions and relevant evidence
4. Jury: don’t want everyone pointing at each other; may not want to be associated with other parties
5. Res Judicata: Don’t want to put all your eggs in one basket; don’t want to be barred from future potential claims
6. Control: may be harder to settle

PERSONAL JURISDICTION

PRELIMINARIES

1. A judgment entered by a state is entitles to “full faith and credit” in al other states. This command “is exacting,” not discretionary, with respect to a judgment rendered by a court possessing adjudicatory authority over they subject matter and persons governed by the judgment.
2. Personal jurisdiction is the power a court has to render a judgment against the defendant.
3. Two things needed: statute & Constitution
4. Ways to approach personal jurisdiction:
   1. Voluntary appearance—show up and argue the merits (lose the right to argue personal jurisdiction in forum or at home)
   2. Special appearance—show up only to argue personal jurisdiction (if you lose, you lose the right to argue personal jurisdiction at home; forced to argue merits in forum)
   3. Direct attack—challenge personal jurisdiction before you do anything else, e.g. simultaneously with your answer
   4. Collateral attack—enter default judgment in forum and then argue personal jurisdiction in home state where judgment is entered (but you forever lose the right to argue the merits of your case)
5. Federal courts have PJ whenever would the state courts in the state in which they sit. Rule 4(k)(1)(a). On federal claims the federal courts can exercise jurisdiction “over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state” as long as “the exercise of jurisdiction is consistent with the Constitution and laws of the United States.” Rule (4)(k)(2). (Three elements: 1) federal claim; 2) D beyond jurisdiction of any sate court; 3) no violation of constitutional rights.) (Can be “sufficient aggregate contacts” with the U.S. as a whole, even though the contacts are so scattered that no one state has jurisdiction, so as to satisfy the due process clause.)
6. USSC will not hear appellate reviews about state statutory law. State courts are the final authority on state law.
7. Sometimes claims can be brought in on pendent PJ. DP is to protect the burden on D. If he’s already there, there is no extra burden, hence no offense of DP.

TYPES OF PERSONAL JURISDICTION

1. **In personam:** power of a court to enter a money judgment against the defendant; said to follow the defendant; given full faith and credit and enforced by any state in which the defendant or his assets are found.
2. **In rem:** the power of a court to act with regard to property within its borders; affects the interests of persons in the property, but does not create an obligation for the defendant to pay money to the plaintiff; example—action to determine title to property among opposing claimants
3. **Quasi in rem:** based on presence of defendant’s real or personal property within the state; based on claims unrelated to the property that provides the basis for jurisdiction; allows money judgment not exceeding the value of the property which may be satisfied through forced sale of the property
4. **Status:** e.g. determining marital status or child custody; court may, for example, entertain a divorce action although one spouse is beyond the usual reach of its in personam or in rem jurisdiction; money awards, such as alimony, still require in personam power over the defendant

TRADITIONAL THEORIES

1. ***Pennoyer v. Neff, USSC, 1877* (pages 612-617)**
   1. Neff is a guy living in Iowa who hears the government is giving away land for settlement. Neff went and stayed in Oregon for 4 years, needed help filing his land title, and employed Mitchell. Mitchell sued for $200 in fees in Oregon. Mitchell claimed he didn’t know where Neff was (California at the time) and, by statute, was able to substitute personal service with service by publication in a small, obscure newspaper. Default judgment for $341. Action to enforce judgment by sale of the land. Mitchell buys the land for $341. Mitchell sold to Pennoyer. Pennoyer upkept and improved the land for 9 years. Neff comes back. Original judgment found invalid in collateral attack; was rendered unconstitutional. (Original judgment in state court, new case in federal court.)
   2. Territorial theory of jurisdiction (power theory)—states have exclusive power over persons or property within the territory and completely lack power over persons or property outside the territory.
   3. Cannot have power over a person not in the state. In personam jurisdiction is valid only in the place where the defendant is. Could rule over land in Oregon, but only in rem, not for personal action. Quasi in rem jurisdicion is OK, but it has an additional restraint. The land has to be attached at the beginning of the suit, secured and put in the possession of the court by an attachment process. Big sign on land to warn those with an interest. If you seize at the beginning of suit it gives proper notice; control of the court should be notice enough to the owner. “The validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently…”
   4. Notice depends on physical presence within the state. Idea: 14th Amendment due process provides the right to limits of where you can be subjec to suit.
2. ***Harris v. Balk, USSC, 1905*****(pages 620-622)**
   1. Harris and Balk were residents of NC. Epstein was a resident of MD. Harris owed Balk $180, Balk owed Epstein $300. While Harris was in MD on business, Epstein had him served with process, which was issued for garnishment. Balk did not contest jurisdiction and paid Epstein the value of his debt to Balk in MD. Balk later sued to collect on the debt in NC, claiming that the MD judgment was not valid since the debt was in NC and did not accompany Harris to MD. The court ruled that service in the state was a proper basis for jurisdiction.
   2. “The cases holding that the state court obtains no personal jurisdiction over the garnishee if he be but temporarily within the state proceed upon the theory that the situs of the debt is at the domicile either of the creditor or of the debtor, and that it does not follow the debtor in his casual or temporary journey into another state, and the garnishee has no possession of any property or credit of the principal debtor in the foreign state.”
   3. “We regard the contention of the plaintiff in error as the correct one…Balk could have sued Harris in MD to recover his debt, notwithstanding the temporary character of Harris’ stay there…valid judgment, because the court had jurisdiction over the garnishee by personal service within the state…”
3. ***Hess v. Pawloski, USSC, 1927* (pages 623-624)**
   1. D, a resident of PA, negligently drove a motor vehicle in MA, injuring P, a resident of MA. D was not personally served, and no property belonging to him was attached.
   2. “Notice sent outside the state to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery.” *Pennoyer*
   3. “Under the statute, implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the nonresident may be involved.”
   4. “And, in advance of the operation of a motor vehicle on its highway by a nonresident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use….having the power to exclude, the state may declare that the use of its highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served.”
4. Traditional bases for PJ (can skip legislature and Shoe test)
   1. Service within state (addressed *Pennoyer*, explicitly expressed in *Balk,* reaffirmed in *Burnham*)
   2. Domicile (“where you live and intend to stay”)
   3. Agency (agent amenable to process within borders)
   4. Express consent (e.g. states making you sign off at the border)
   5. Implied consent (*Hess*-driving in a state implies that you consent to jurisdiction and that you appoint the registrar as you agent for service; same in *Kane v. New Jersey*)
   6. Waiver (didn’t contest soon enough)
   7. Corporate presence

CONSENT/FORUM SELECTION CLAUSES

1. ***Carnival Cruise Lines v. Shute, USSC, 1991* (pages 736-742)**
   1. Washington resident not allowed to sue in Washington when she purchased a cruise ticket through a Washington travel agent for a cruise embarking from LA and sailing to Mexico, and she was injured in international waters off the Mexican coast. The fine print on her ticket included a forum selection clause for all litigation to take place in Florida. The term was deemed accepted by acceptance of the ticket.
   2. Reasons court cited for requiring the clause to be followed:
      1. Cruise line’s special interest in limiting where it could be subject to suit
      2. Dispelling confusion about where suits must be brought, sparing time and expense of pre-trial motions
      3. Passengers’ benefit of lower fares resulting from Carnival’s lowered costs due to limiting litigation
      4. No proof of exceptionally burdensome inconvenience
   3. For a forum selection clause to be valid there are two requirements:
      1. If P has received adequate notice of the forum selection clause
      2. If D can show sufficient reasons for including the clause in the contract
   4. Dissent: Passenger was not fairly and fully notified about the forum selection clause in the fine print, would have already purchased ticket before reading and would not have had opportunity to return or to make other travel arrangements so the provision is not reasonable, disparate bargaining power
2. Forum selection clauses are routinely enforced.
3. Other law (primarily from The Bremen v. Zapata) that will not enforce FS clause if:
   1. FS clause was a product of fraud
   2. Party opposing clause would be practically deprived of day in court
   3. Fundamental unfairness of enforcing clause would deprive P of remedy
   4. Enforcement would contravene strong public policy of forum
4. Forum selection is not the same as choice of law
5. Contractual forum selection v. binding arbitration clauses
   1. Almost no chance of overturning a binding arbitration judgment. Courts review with a very high standard.
6. Wavier v. nonwaiver when appealing a forum selection clause. Courts are split over which subsection of Rule 12 this would fall under. 12(b)(2), (b)(3); right waived if you don’t bring up timely. 12(b)(1); never waivable. 12(b)(6)/12(c); hard to waive. Motion for summary judgment.

MODERN-TWO STEP PROCESS

1. Long-arm statutes
2. Constitutional Analysis
   1. Minimum Contacts
   2. Reasonableness

LONG-ARM STATUTES

1. Do the state’s enumerated long arm statutes authorize jurisdiction?
2. While most states have enumerated long-arm statutes, some have expressly authorized jurisdiction up to the constitutional limit. Even those states with enumerated long-arm statutes have typically interpreted their statutes to reach to the constitutional limit.
3. General jurisdiction not authorized by statute if it is not interpreted to go to Constitutional limits.
4. No statutory amenability analysis required for resident Ds. State courts always open to resident Ds.
5. ***Gray v. American Radiator, SC of Illinois, 1961* (CM 56-57)**
   1. Gray was injured in Illinois when a water heater manufactured by American Radiator, a PA company. The explosion was caused by a defect in a valve manufactured by Titan, a foreign corporation, and then sold and incorporated into the water heater by American Radiator outside of IL. Titan was served via service of its registered agent in Ohio. Titan moved to dismiss based on contentions that it had not committed a tortuous act in IL, had no agent there, and sold its components to AR outside of IL.
   2. IL long arm statutes provide that “a nonresident who, either in person or through an agent, commits a tortuous act within this state submits to jurisdiction.”
   3. Two questions: (1) whether a tortuous act was committed within the state, and (2) whether the statute, if so construed, would violate due process of law.
   4. (1) “We think it is clear that the alleged negligence in manufacturing the valve cannot be separated from the resulting injury; and that for present purposes, like those of liability and limitations, the tort was committed in Illinois. Titan seeks to avoid this result by arguing that instead of using the word ‘tort,’ the legislature employed the term ‘tortious act’; and that the latter refers only to the act or conduct, separate and apart from any consequences therof. We cannot accept the argument. To be tortious an act must cause injury. The concept of injury is an inseparable part of the phrase.”
   5. (2) “Defendant’s only contact with this state is found in the fact that a product manufactured in Ohio was incorporated in Pennsylvania, into a hot water heater which in the course of commerce was sold to an Illinois consumer….We do not think, however, that doing a given volume of business is the only was in which a nonresident can form the required connection with this State…it is sufficient if the act or transaction itself has a substantial connection with the State of the forum. [Reference McGee; one insurance policy sold to a CA resident was enough.] …Reasonable inference that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this state…benefited, to a degree, from the protecition which our law has given to the marketing of hot water heathers containing its valves…presumably sold in contemplation of use here…where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary stream of commerce is sufficient contact with this State to justify a requirement that he defend here.”
   6. Class note: The court ignored the legislative meaning by looking at tort law. The legislature meant to reach out and grab wrongdoers elsewhere where the effect of their actions is felt in IL. It is not limited to IL as the place of injury.
6. Three flavors of long-arm statutes:
   1. Expressly allowed full constitutional due process.
   2. Expressly limit (e.g. only these cases). Almost all have been interpreted to the extent of due process.
   3. Limit with catch-all clause.
7. For example of long-arm statute, see OH long-arm (CM 58)

MINIMUM CONTACTS

1. Burden of proof lies with P to establish (Burger King.)
2. ***International Shoe Co. v. State, USSC, 1945* (pages 625-630)**
   1. The state of Washington sought to recover unpaid contributions to the state unemployment fund based on a specified percentage of the company’s employees’ wages paid for services within the state. Notice was personally served upon a sales solicitor employed by Shoe in the state, and a copy of the notice was mailed by registered mail to Shoe at its offices in St. Louis, MO. Shoe insists that service on the salesman was not proper, nor was the service by mail. Jurisdiction was allowed based on minimum contacts.
   2. Contacts:
      1. Shoe is a DE company with its principal place of business in MO. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the state of Washington.
      2. No offices in Washington and makes no contracts either for sale or purchase of merchandise there. Maintains no stock of merchandise there and makes no deliveries of goods in intrastate commerce.
      3. Between 1937-1940 employed about a dozen salesmen there under direct supervision of sales managers in MO. Resided there, principal activities confined to that state, compensated by commissions based on their sales in that state. Commissions for each year totaled more than $31K.
      4. Supplies salesmen with a line of samples to display to prospective purchasers.
      5. Occasionally rent permanent sample rooms or temporary hotel or business rooms for exhibiting samples. Shoe reimburses the cost of the rentals.
      6. Salesmen forward orders to the main office and shipments and collections are made from points outside of Washington to customers within the state. Salesmen are not authorized to enter into contracts or make collections.
   3. “…rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there.”
   4. “Due process requires only that in order to subject a defendant to judgment in personam, if he be not present such within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”
   5. “‘Presence’ in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.”
   6. “Conversely, it has been generally recognized that the casual presence of the corporate agent or even his conduct of single isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there.”
   7. “There have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”
   8. “But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”
   9. Idea: Doesn’t offend due process when you are subject to suit in that state for claims involving the business you do in the state. D can avoid suit in the state by not doing business there. Doing business means that you could reasonable expect to be sued in the state.

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| --- | --- | --- | --- | --- |
| **Level of Forum Activity:** | Effects of out-of-state conduct felt within the forum | Single act within forum | Mid-range of activities within forum | Continuous systematic & substantial activities within forum |
| **Relation of Claim to Activity:** | Only related claims | Only related claims | Only related claims | All claims, related or not |

1. General vs. Specific Jurisdiction
   1. You can have so many contacts with a state that you are subject to any suit there. (General jurisdiction.)
   2. It is also possible that you could have only 1 contact that I perfectly related to the claim, and that would be enough to subject you to jurisdiction. (Specific jurisdiction.) (Old theory = implied consent. New theory = no offense of due process clause; it’s fair.) Choice to drive and could have elected not to. Took risk of injury. Could foresee you could have to defend. No violation of due process. Fair.
2. *Hanson v. Denckla*-“Unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant’s activity but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.”
3. ***World–Wide Volkswagen Corp. v. Woodson, USSC, 1980* (pages 641-651)**
   1. Plaintiffs purchased an Audi car from defendant Seaway in New York. Defendant World-Wide is the regional distributor for New York, New Jersey, and Connecticut. World-Wide is incorporated in New York. Plaintiffs were en route, moving from New York to Arizona when their car was rear ended in a collision in Oklahoma. The gas tank exploded and the passengers were severely burned. Plaintiffs sued in Oklahoma and defendants contend that they do not have sufficient contacts with Oklahoma to justify personal jurisdiction over them.
   2. “The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” [See notes 8, 9, 10. In 1982 courts shifted the focus from state sovereignty to individual liberty interests. This makes more sense with consent and waiver.]
   3. “Applying these principles to the case at hand, we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in OK. They close no sales and perform no services there. They avail themselves of non of the privileges and benefits of Oklahoma law. They solicit no business there…Nor does the record show that they regularly sell cares to Oklahoma customers or seek to serve the OK market.”
   4. “It is argued, however, that because an automobile is mobile by its very design and purpose it was “foreseeable” that the Robinsons’ Audi would cause injury in OK. Yet “foreseeability” alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause….This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather it is that the defendant’s conduct and connection with the forum state are such that he should reasonable anticipate being haled into court there.”
   5. “The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state…It is foreseeable that that purchasers of automobiles sold by WW and Seaway may take them to OK. But the mere “unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.”
   6. Brennan Dissent:
      1. “An automobile simply is not a stationary item or one designed to be used in one place. An automobile is intended to be moved around…The dealer actually intends that the purchasers will use the automobiles to travel to distant states where the dealer does not directly “do business.” The sale of an automobile does purposefully inject the vehicle into the stream of interstate commerce so that it can travel to distant states.”
      2. “Furthermore, and automobile seller derives substantial benefits from States other than its own. A large part of the value of automobiles is the extensive, nationwide network of highways. Significant portions of that network have been constructed by and are maintained by the individual states, including OK…enhances the value of the petitioners’ business by facilitating their customers’ traveling.”
   7. Marshall (and Blackmun) Dissent:
      1. “But the basis for the assertion of jurisdiction is not the happenstance that an individual over whom petitioner had no control made a unilateral decision to take a chattel with him to a distant state. Rather, jurisdiction is premised on the deliberate and purposeful actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles.”
      2. “In fact, the nationwide service network with which they are affiliated was designed to facilitate and encourage such travel. Seaway would be unlikely to sell many cars if authorized service were available only in Massena, N.Y. Moreover, local dealers normally derive a substantial portion of their revenues from their service operations and thereby obtain a further economic benefit from the opportunity to service cars which were sold in other States. It is apparent that petitioners have not attempted to minimize the chance that their activities will have effects in other states; on the contrary, they have chosen to do business in a way that increases that chance, because it is to their economic advantage to do so.” [Court cites all of this as “purposeful conduct.”]
   8. Blackmun dissent:
      1. Any automobile is likely to wander far from its place of licensure or from its place of distribution and sale…I see nothing unfair…Cases dealing with other instrumentalities will be deal with as they arise and in their own contexts.”
   9. Class notes:
      1. Contrast Gray; chose to regularly send products that ended up in IL.
      2. Can’t hold accountable wherever the product goes. Else D would have no way to order their behavior so as to avoid liability in a particular state.
      3. Distinction between seeking to serve and doing business when someone comes to you.
      4. What is dissenters’ rationale? Want access to justice for P. State interest in protecting citizens.
      5. Specific jurisdiction. Out of state conduct felt within the forum.
4. ***Ashai Metal Industry Co., Ltd. v. Superior Court of California, Solano County, USSC (1987)* (pages 660-668)**
   1. “Question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the US would reach the forum state in the stream of commerce constitutes ‘minimum contacts.’”
   2. Zurcher filed suit for a motorcycle wreck that severely injured him and killed his wife. He lost control of his Honda motorcycle when the rear tire, manufactured by Chen Shin Rubber (Taiwan) who had incorporated a faulty valve stem manufactured by Ashai (Japan), lost air pressure and exploded.
   3. Contacts:
      1. Ashai is Japanese. It manufactures tire valves in Japan and sells them to Chen Shin and others for use in finished tire tubes. The sales to CS took place in Taiwan. The shipments were sent from Japan to Tawain.
      2. CS bought and incorporated 1.35 MM Ashai valves from 1978-82 and accounted for approximately 1.24% of Ashai’s income in ‘81 and .44% in ‘82. CS also purchases valves from other suppliers.
      3. CS sells finished tubes throughout the world. About 20% of its US sales are in CA.
      4. In one cycles sore in Solano County of 115 tubes 97 were manufactured in Japan or Taiwan. Of those, 21 valve stems were marked with Ashai’s trademark. Of those 12 were in Cheng Shin tubes. The store had 41 other Cheng Shin tubes with valves from other suppliers.
      5. There is conflicting testimony as to whether or not Ashai contemplated that is valve assemblies would end up throughout the US and in California.
   4. O’Connor view—4 justices (stream of commerce, plus):
      1. “The determination of whether an exercise of personal jurisdiction comports with due process ‘remains whether the defendant purposefully established “minimum contacts” in the forum state...that minimum contacts must have a basis in ‘some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *BK*…‘Jurisdiction is proper…where the contacts proximately result from actions by the defendant himself that create a “substantial connection” with the forum state.’ *McGee*.”
      2. “Require the action of the defendant to be more purposefully directed at the forum state than the mere act of placing a product in the stream of commerce….minimum contacts must come about by an action of the defendant purposefully directed toward the forum state.”
      3. “For example, designing the product for the market in the forum state, establishing channels for regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state. But a defendant’s awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act o placing the product into the stream into an act purposefully directed toward the forum state.”
      4. Reasonableness—consider: burden on D, interest of forum state, plaintiff’s interest in obtaining relief, “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies.”
      5. Court ruled unreasonable and unfair because: Case had already been settled with CA resident; what was left was an indemnification battle between Ashai and Cheng Shin, burden of foreign legal system, lack of convenience, transaction took place in Taiwan, shipments took place between Taiwan and Japan, California’s interest severely diminished
   5. Brennan view—4 justices (stream of commerce only):
      1. “The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise. Not will the litigation present a burden for which there is no corresponding benefit. A defendant who have placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum state, and indirectly benefits from the state’s laws that regulate and facilitate commercial activity.”
   6. Unresolved today. Case was decided on unreasonableness, in spite of the split with respect to stream of commerce. Scalia didn’t sign. Having decided step 1, never reached step 2.
5. ***Burger King v. Rudzewicz, USSC, 1985* (pages 672-684)**
   1. Florida’s long-arm statute extends jurisdiction to any person who “breaches a contract in this state by failing to perform acts required by the contract to be performed in this state,” so long as the cause of action arises from the alleged contractual breach. This case is regarding “personal jurisdiction over a Michigan resident who allegedly had breach a franchise agreement with a Florida corporation by failing to make payments in Florida. The question presented is whether this exercise of longarm jurisdiction offended ‘traditional conceptions of fair plan and substantial justice.’”
   2. Contacts:
      1. Burger King is a FL corporation whose principal offices are in Miami. It has over 3,000 outlets in the 50 states, Puerto Rico, and 8 foreign nations. In exchange for franchise benefits, franchisees pay BK and initial $40K franchise fee, monthly royalties, advertising and promotion fees, and monthly rent.
      2. The governing contracts provide that the franchise relationship is established in Miami and governed by FL law, and fall for payment of all required fees and forwarding of all relevant notices to the Miami headquarters.
      3. Day-to-day monitoring of franchises is conducted through a network of 10 district offices. In this case, R applied for franchise located in Michigan through the Michigan district office, and the application was forwarded to Miami headquarters.
      4. Coplaintiff McShara took a management course in Miami, the franchise purchased restaurant equipment from BK’s division in Miami, Ps negotiated with both the Miami and district offices.
      5. The agreement finally signed was for a 20-year franchise relationship involving personal payments of over $1MM.
      6. R fell behind in payments and BK in Miami sent notices of default, and an extended period of negotiations began between R and both the Miami and district offices.
   3. “And with respect to interstate contractual obligations, we have emphasized that parties who “reach out beyond one state and create continuing relationships and obligations with citizens of another state” are subject to regulation and sanctions in the other state for the consequences of their activities...Moreover, where individuals ‘purposefully derive benefit’ from their interstate activities, it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities.”
   4. “Jurisdiction is proper, however, where the contacts proximately result from the actions by the defendant himself that create a ‘substantial connection’ with the forum state…Thus where the D ‘deliberately’ has engaged in significant activities within a state, or has created ‘continuing obligations’ between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the ‘benefits and protections’ of the forum’s law it is presumptively not unreasonable to require him to submit to the burdens of litigation in the forum as well.”
   5. Dissent: Appellee did business only in Michigan, his business, property, and payroll taxes were payable in that state, and he sold all of his products there. Appellee’s principal contacts with appellant were with its Michigan office.
   6. Reasons court cites for jurisdiction being proper (according to Hoffman):
      1. Brief training in FL
      2. Negotiating with FL for a nationwide contract
      3. Long contract requiring continuing contacts with FL company
      4. Refusal to make payments would have impact on FL company
   7. Others:
      1. Choice of FL law
      2. R sought out BK
      3. Interest of FL courts
      4. Failed to demonstrate unfairness
   8. Class notes:
      1. Choice of law applies to all suits, no matter what forum. If there is no contract term, the choice of law corresponds with the state that has the most significant interest/significant connection with the suit, regardless of where the case is actually tried.
      2. Choice of law can have only one correct state applied, while personal jurisdiction can apply in many places. Why are there different tests for choice of law and personal jurisdiction? First priority is D’s activities. Then state’s interest in providing a forum.
      3. Choice of law is not the same as choice of forum.
      4. Arguments for consumer: No long term relationship, no physical presence, high burden on individual, no prior negotiations or contemplated future dealings.
6. Why look at evidence instead of just 4 corners of allegations? 12(b)(2) is not limited to allegations. May attach evidence to support motion of answer. Jurisdictional discovery. Can ask for discover in your answer to 12(b)(2).
7. State lines matter. You can always have jurisdiction on the other side of Texas, but not just over the border in LA. It’s not just about miles. However, proximity helps establish intent.
8. Minimum contacts (akin to purposeful availment):
   1. Specific act directed at forum (*Shoe)*
   2. Foreseeability of suit (*WWV)*
   3. Purposeful availment of market (*Gray*)
   4. Seeking to serve (*WWV*)
   5. Effects reasonably calculated to be felt in forum (*Calder*)
   6. NOT unilateral act of buyer (Denckla)
9. ***Shaffer v. Heitner, USSC, 1977* (pages 695-707)**
   1. Court attempted to seize defendant’s stock in a Delaware corporation even though the company’s PPB was in Arizona. Defendants had no contacts with DE. The court seized the stock in a quasi in rem action, under DE statute, in order to compel the personal appearance of nonresident defendant to answer and defend suit, at which point the property would be released.
   2. The court ruled that there must have still been minimum contacts with the state in order for it to have personal jurisdiction (which it did not in this case). Unless there is a traditional basis for jurisdiction where MC does not have to be evaluated, all assertions judged by MC must be judged by *Shoe*. (Applied to quasi-in-rem jurisdiction as well as in personam.)
   3. Now quasi-in-rem really only applies when executing judgment from another state (post-judgment) or to avoid hiding assets (pre-judgment).
10. ***Burnham v. Superior Court of California, USSC, 1990***
    1. Burnham, a WV resident, was personally served with process by his ex-wife (then living in CA with their children) when, while on a business trip, he stopped in to see his children.
    2. Court upheld in-state service.
    3. “The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of ‘traditional notions of fair play and substantial justice.’”
    4. Dissent:
       1. “All rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process…Rather I find the historical background relevant because, however murky the jurisprudential origins of transient jurisdiction, that fact that American courts have announced the rule for perhaps a century (first in dicta, more recently in holdings) provides a defendant voluntarily present in a particular State today ‘clear notice that [he] is subject to suit’ in the forum.”
       2. “Without transient jurisdiction, an asymmetry would arise: A transient would have the full benefit of the power of the forum State’s courts as a plaintiff while retaining immunity from their authority as a defendant.”
11. ***Nicastro v. J. McIntyre Machinery Ltd., SC of NJ, 2008* (handout)**
    * + - 1. Defendant is J. McIntyre Machinery, Ltd., a company incorporated in the UK, which sold through its exclusive distributor in the US, McIntyre Machinery America, Ltd., a machine to Curcio Scrap Metal of whom Nicastro was an employee. Nicastro was injured at work because the model did not have a safety guard that would have prevented the accident. He sued on a products liability claim. Court found jurisdiction (presumably specific).
          2. Contacts:

Sold machine to NJ through exclusive American distributor.

Owner of Curico was introduced to the machine at McIntyre America booth at a trade convention in Las Vegas.

Machine was shipped from McIntyre America in Ohio, to NJ. Invoice was made payable to McIntyre America.

Machine and information sheet listed McIntyre’s address in England as well as telephone and fax numbers. Instruction manual referenced both US and UK safety regulations. Buyers would have had to call England office for parts and service

McIntyre Ltd. holds both American and European patents.

President attended scrap metal conventions in Las Vegas, New Orleans, San Diego, and San Francisco.

Distributer’s advertising and sales efforts were in accordance with England’s direction and guidance when possible. Some of the machines were sold on consignment to distributor.

* + - * 1. “We hold that a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes NJ, may be subject to in personam jurisdiction of a NJ court in a product-liability action.” [The “plus” factor under O’Connor would be the targeting of the national market.]
        2. Reasonableness: If it’s not too inconvenient for them to attend trade conventions, then it shouldn’t be too inconvenient for them to defend.
        3. “A foreign manufacturer will be subject to this state’s jurisdiction if it knows or reasonably should know that through its distribution scheme its products are being sold in NJ…The focus is not on the manufacturer’s distribution scheme, but rather on the manufacturer’s knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are being sold.”
        4. Dissent: Majority has “substituted any effort my a manufacturer to sell its product anywhere in the nations as the only act needed for assertion of our jurisdiction…stream of commerce is but one part of the jurisdictional inquiry…it is inappropriate to define the stream of commerce theory in such a way that the label takes the place of an evaluation of purposeful availment.” [No targeting of NJ in particular.]

GENERAL JURISDICTION

* + - 1. Why have general jurisdiction? Always at least 1 jurisdiction where there is no fight and you can get to the merits.
      2. Can be subject to GJ in more than one place. Always in the place incorporated, but problem: may incorporate outside the U.S. to avoid jurisdiction. Alternative theory: equivalent of forum residence. GJ usually found in PPB. No general theory of GJ.
      3. In GJ, ALL contacts count. (Strong man w/ mallet dinging bell at carnival.)
      4. ***Helicopteros Nacionales De Colombia v. Hall, USSC, 1984* (pages 726-732)**
         1. Helicol, a Columbian company with PPB in Bogota negotiated and contracted to provide helicopter transportation in Peru for Consorcio, a Peruvian consortium (alter ego WSH), headquartered in Houston. A Helicol chopper crashed, killing four U.S. citizens, none residents of Texas. General jurisdiction was not found.
         2. Contacts:

H’s president negotiates in Houston

Buy $4MM of choppers in Fort Worth

Pilots trained in Forth Worh

Subsequent interactions with Bell Helicopters, a FW company

Helicopters from TX went to South America

Checks cleared from bank in TX

* + - * 1. This appears to be a case for negligent flying. It appears to be an error that the attorneys did not argue specific jurisdiction, but they had to argue for general; there would have been no SJ in Texas for negligent flying in Peru.
        2. Lingering uncertainty: is the test for PJ “arises out of” or “related to” contacts with the forum? Footnote 10, page 729.
        3. Hoffman: Ultimate question—is the exercise of jurisdiction constitutional? SJ = foreseeability of specific claim. GJ = foreseeability of any claim.
      1. *Perkins v. Benguet Consolidated Mining Co., USSC, 1952 (mentioned in Helicopteros, top of page 729)*
         1. Only other SC GJ case
         2. GJ found where Philippine company in Ohio essentially moved their business there:

President maintained office from which he conducted activities on behalf of the company

Kept files

Held directors meetings

Carried on correspondence

Distributed salary checks drawn on two Ohio bank accounts

Engaged an Ohio bank to act as transfer agent

Supervised policies dealing with the rehabilitation of the corporation’s properties in the Philippines

* + - 1. ***Brown v. Goodyear (Turkey/France/Luxembourg?), NC Court of Appeals, 2009* (handout)**
         1. Plaintiffs’ intestates, NC residents, were killed in an accident in France when their bus wrecked as a result of a faulty Goodyear tire manufactured in Turkey. GJ was found in NC.
         2. Contacts:

Tire contained information written in English, including US DOT required markings. Also had load and pressure ratings to conform to US Tire and Rim Association standards and an English safety warning.

From 2004-07 at least 5906 GY Turkey tires were shipped into NC, at least 33,932 GY France tires, and at least 6402 Luxembourg tires, not including tires on vehicles equipped with them.

* + - * 1. “The necessary ‘purposeful availment’ has been found where a corporation ‘delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.’…Thus, at an absolute minimum, the manufacturer contemplated that the tires might be sold in this country.”
        2. “Tires manufactured by Ds were shipped to the US for sale and that there was no attempt to keep these tires from reaching the NC market…In addition, the tires manufactures be each D were actually sold in NC.”
        3. “Purposefully and intentionally manufactured tires and placed them in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in NC. Ds also knew or should have known that a Goodyear affiliate obtained tires manufactured by D and sold them in the US in the regular course of business…highly-organized distribution process.”
        4. Court also noted the various burdens of Ps and Ds, observing that it would be easier on Ds since they have corporate affiliates in the US with business interests in NC, a fact that is not true for the Ps with respect to France.
        5. **DISTINCT MINORITY VIEW.**

DEFAMATION CASES

1. ***Calder v. Jones, USSC, 1984* (pages 654-656)**
   1. Shirely Jones was a Hollywood actress who lived and worked in CA. She brought suit against National Enquirer (a Florida business) and two of its employees, Calder and South (both residents of FL), claiming she was libeled in an article written and edited by petitioners in FL. The article was published in a national magazine with a large circulation in CA.
   2. Contacts:
      1. South frequently travels to CA on business. Calder has been only once, on a pleasure trip.
      2. NI publishes a weekly newspaper with a total circulation of about 5MM. About 600K of those copies are in CA, almost twice the level of the next highest state.
      3. Story was bout CA activities of CA resident whose career was centered in CA. Drawn from CA sources.
   3. “The brunt of the harm, in terms both respondent’s emotional distress and the injury to her professional reputation, was suffered in CA. In sum, CA is the focal point of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in CA based on the “effects” of their FL conduct in CA.”
   4. “Petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at CA….And they knew that the brunt of that injury would be felt by respondent in the state in which she lives and works and in which the NI has its largest circulation.”
   5. Note: The contacts of each D were to be measured separately.
2. *Keeton v. Hustler Magazine, Inc. USSC, 1984* (note 3, page 656)
   1. Court ruled that 10-15K copies of the magazine sold in NH each month, its only contact with the forum, constituted purposeful contacts to justify the exercise of jurisdiction over defendant on this claim.
   2. “Where *Hustler Magazine* has continuously and deliberately exploited the NH market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.”
3. *Gordy v. Daily News, 9th Cir., 1996* (note 4, page 657)
   1. Jurisdiction found in CA over NYDN and its columnist in an action brought by a CA resident even though the paper sonly sold 13 daily editions and 18 Sunday editions to CA subscribers.
   2. Court reasoned that the plaintiff lived in CA and the column was “of a nature that it would clearly have a sever impact on Gordy as an individual. It is reasonable to expect the bulk of the harm from defamation of an individual to be felt in his domicile.”

REASONABLENESS

1. See *Ashai* above. Only SC case to be decided on reasonableness.

NOTICE

BASICS:

3-step process to evaluate whether court has power over a defendant:

1. Notice
   1. Statutory or rule-based authority
   2. Constitutional aspects
2. Assuming notice, then evaluate statutory amenability to suit (not needed for resident Ds; courts always open to resident Ds)
3. Constitutional permissibility
   1. Minimum contacts
   2. Reasonableness
4. Formal notice = service of process & an opportunity to be heard.
5. Service of process includes: 1) complaint/petition, and 2) citation/summons.

STATUTORY AUTHORITY:

1. Must identify a source of law that tells how the citation can be issued. (Sometimes a separate statute, sometimes rolled up in the long-arm statute.)
2. TX methods (Tex. Rules of Civ. P. 103/106/108):
   1. Personal
   2. Registered/certified mail
   3. Substituted service (publication, leave with someone likely to get it to you, etc.; usually judge has to grant an order allowing)
   4. Non-residents = same rules
3. Federal methods (Rule 4)
   1. e2A – personal service
   2. e2B – substituted service
   3. e2C – agent approved by law
   4. 4e1 – by following state law
   5. 4d – waiver; can get D to agree no to go through the trouble of formal service. Then they get 60 days instead of 20 to answer. Also, if D has no good reason, can have to pay costs P incurs in formally serving.
4. Location of service – federal (Rule 4)
   1. k1A – authorized by state statute
   2. k1C – authorized by federal statute
   3. k1B – 100-mile radius “bulge rule,” but only for Rule 14 or 19 Ds
   4. k2 – federal question cases, if D is not subject to jurisdiction in any state (principle – MC with the U.S. as a whole, so federal court has authority, even when state courts may not)

CONSTITUTIONAL ANALYSIS

1. Don’t really run into this often because current statutory approved methods have generally been upheld.
2. ***Mullane v. Central Hanover Bank & Trust Co., USSC, 1950* (pages 742-749)**
   1. Court ruled that service by publication was not sufficient when the issuing party knew where the directly interested beneficiaries of a common trust resided and could have mailed them process, even though the NY statute allowed for service by publication in this case, and they received notice initially that announcement of all future adjudications would be made only through publication of name and date of the trust company, date of the establishment of the common trust fund, and a list of all participating estates, trusts, or funds.
   2. Due Process Clause requires “that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”
   3. “The fundamental requisite of due process of law is the opportunity to be heard.”
   4. “Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents.”
   5. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied…”
   6. “The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it….or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other feasible and customary substitutes.”
   7. Notice by publication is adequate only where “it is not reasonably possible or practicable to give more adequate warning.”
   8. 3 categories of people:
      1. Beneficiaries you don’t know where they are. (Publication OK.)
      2. Beneficiaries you know where they are, but rights are too contingent or could be protected by giving someone else notice. (Publication OK.)
      3. Direct beneficiary whose address is known. (Must make best efforts.)
   9. *Dusenbery v. United Sates.* Requires reasonably calculated attempt, not achieving actual notice itself.
   10. U.S.P.S has been generally held to be the standard minimum requirement, if feasible.
3. ***Jones v. Flowers, USSC, 2006* (CM 61-78)**
   1. Service deemed insufficient when mailed to the defendant certified mail, not picked up within 15 days, and returned to the sender, who subsequently published notice in the paper.
   2. “We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed.”
   3. Watching mailman drop mail down sewer analogy.
   4. “In prior cases we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.” [state knew vehicle owner was in prison; incompetent property owner without guardian]
   5. Letter being returned is a practicality and peculiarity of the case. “We conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so.”
   6. Could have sent by regular mail so new occupants may have sent the notice on to Jones. Could have posted notice on the front door. State was not required to look up address in the phone book since it was Jones’s obligation to keep his address up to date with the tax collector, and it is significantly more burdensome that sending in the mail. Purchasing a newspaper ad was more burdensome and expensive than mailing.
   7. It was reasonably possible and practicable to give more adequate warning, so publication was not enough.
   8. Example of a generally Constitutional method becoming unconstitutional due to the fact pattern.
4. Is there tag jurisdiction without due process? Courts are split.

VENUE

PRELIMINARIES

1. Determines **districts** in which a case can be brought. **Geographical** limitation. Sub-constitutional. Purely statutory.
2. To sue you need:
   1. PJ
   2. SMJ
   3. Venue
3. Can only transfer within federal system. Can’t force a state to take a case. If you want to move to state court, have to dismiss and re-file.
4. Can have multiple appropriate venues.
5. Hierarchy of venue requirements:
   1. Mandatory (e.g. state real estate title); trumps 1391
   2. Specific permissive (e.g. 1397 interpleader); can overrule 1391; harder to use 1404 to overcome because Congress has specifically suggested
   3. General; 1391 always applies unless trumped by mandatory venue

GENERALLY

**28 USC 1391. Venue generally**

1. A solely **diversity action** may only be brought in
2. a judicial district where any defendant resides, if all defendants reside in the same state
3. a district where a substantial part of the events occurred or where a substantial part of the property in question is located
4. a district that has PJ over any D at the time the action commences **only if (1) and (2) don’t apply**
5. A **non-diversity** action
   1. a district in which any defendant resides, if all reside in the same state
   2. a district where a substantial part of the events occurred or where a substantial part of the property in question is located
   3. a district in which any D resides **only if (1) and (2) don’t apply**
6. **Corporations** are deemed to reside in any district in which they are subject to PJ at the time the action is commenced. If a state has more than one district the corpotation resides in any district that it has minimum contacts with. If there is no such district, it resides in the district with which it has the most significant contacts.
7. An **alien** may be sued in any district.
8. Residence probably = domicile. (Where you live and intend to stay.) State of citizenship has no bearing. You are domiciled in the previous state until you change your domicile.
9. Permanent residents are considered citizens of the state where they are domiciled. (No effect on 1391.)
10. Does not apply to patent cases (USC 1400) and actions against the US government (USC 1402).

TRANSFER (ASSUMES VENUE ALREADY PROPER)

**28 USC 1404. Change of venue**

1. For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.  **If convenient for everyone & in the interest of justice to do so, MAY move to another district where suit could have originally been brought.**
2. Upon motion, consent, or stipulation of all parties, any action, suit or proceeding of a civil nature may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district.  **Motion to transfer venue.**
3. A district court may order any civil action to be tried at any place within the division in which it is pending.
4. Must make showing that the suit could have been brought in the other venue, and why it is a better venue.

IMPROPER VENUE

**28 USC 1406. Cure or waiver of defects**

1. If venue is improper, the court should dismiss, or if it be in the interest of justice, transfer the case.
2. If venue is improper, a party waives its right to challenge jurisdiction if it does not interpose a timely and sufficient objection to the venue.

1. Typical response is dismissal.

FORUM NON CONVENIENS

GENERALLY

1. **Dismissal** when a particular forum (although proper) is not the most appropriate forum.
2. History:
   1. Before 1948 – no statute to transfer from a proper venue to a better venue. Had to dismiss for FNC and then P had to re-file.
   2. 1948 – *Gilbert* FNC case decided right before USC 1404 enacted.
   3. Now **FNC really only applies to where a foreign court or state court is the more proper forum** (rarely seen w/ state courts).
3. **Forum selection** clauses. Can be dealt with through MJS, 12b3, or FNC. But FNC is not as correct as 12b3. FNC assumes venue proper, but 12b3 assumes improper. Forum selection usually upheld.
4. Can condition a dismissal on waiver of certain core defenses (e.g. SOL, PJ, ect.)

TWO-STEP TEST (*Piper*):

1. Is there another adequate and available forum? (Almost always.)
   1. Court must have “justifiable belief” in an alternative forum (*BCCI v. State Bank of Pakistan*)
   2. Pure corruption so extreme that P would not be able to get justice
   3. Insurmountable procedural barrier such as statute of limitations
   4. The fact that the laws are less favorable to P does not by itself bar dismissal (*Piper*)
   5. Policy: How much evidence should P have to show? FNC is addressed before any substantive issues. Could P be too burdened by mini-trial over FNC that the prohibitive costs prevent him from filing elsewhere?
2. Balancing of public and private interests
   1. Less deference given to the forum chosen by an alien than chosen by a citizen. Weaker connection with forum. However, not dispositive. (*Iragorri*)
   2. Private
      1. Relative access to sources of proof
      2. Witness costs and availability
      3. Possibility of viewing premises
      4. Whether judgment could be enforced
      5. All other practical problems that make trial of a case easy, expeditious, and inexpensive (travel expenses, etc.)
   3. Public
      1. Court congestion
      2. Burden of jury duty
      3. Forum interest (usually makes the difference); usually synonymous with choice of law under modern most significant relationship test.
      4. Conflicts of law problems

STRATEGY (PIPER)

1. P’s file in CA state court against Scottish defendants.
2. D’s remove to federal court on diversity jurisdiction. (If you fail to remove, you forever lose your right to remove. To be careful, D’s did this before arguing anything before CA court. That’s why no motion to dismiss.)
3. D’s transfer to PA federal court. (Same reason for moving to PA. At least if you end up losing the Scotland argument, you will end up in PA and not CA.)
4. D’s file FNC motion.

SUBJECT-MATTER JURISDICTION

THREE STEPS:

1. **US Constitution – Article 3, Section 2**
   1. “arises under the law or treaties of the U.S.”
   2. Admiralty and maritime law
   3. US as a party
   4. Controversies between states
   5. Controversies between a state and a citizen of another state
   6. Between citizens of different states
   7. Between a state or citizen of a state and foreign states, citizens, or subjects
   8. Note: No AIC requirement
2. **Enabling legislation** (Constitution is not self-executing)
   1. Diversity of citizenship (28 USC 1332)
   2. Federal question (28 USC 1331)
   3. Supplemental jurisdiction (28 USC 1367)
3. **Common law interpretations**
   1. “Well-pleaded complaint rule”
   2. complete diversity

DIVERSITY OF CITIZENSHIP

**28 USC 1332. Diversity of citizenship; amount in controversy; costs**

1. Jurisdiction where matter in controversy exceeds $75,000 and
   1. Citizens of different states
   2. Citizens of a state and citizens or subjects of a foreign state
   3. Citizens of different states where foreign citizens are additional parties
   4. A foreign state as a plaintiff and citizens of a state or of different states
2. If plaintiff ends up recovering less than $75 K, court may deny costs to the plaintiff and may impose costs on the plaintiff.
3. (1) Corporate citizen is a citizen of any state where it is incorporated and where it has its principal place of business. [Used to just be where incorporated, but now multiple places. Makes it harder for corporate defendant to get into federal court. Perception that corporate interests are better served in federal courts.]
4. (2) Jurisdiction in class action over $5MM and where any member of a class of plaintiffs is a citizen of a different state than any defendant.
5. **Measuring diversity**
   1. **Complete diversity** required (*Strawbridge v. Curtiss*): No plaintiff from the same state as any defendant.
   2. **Minimal diversity** could be made sufficient by Congress since complete diversity is just a common law interpretation. This has been done 3 times, including 28 USC 1335 (interpleader) and CAFA – 28 USC 1332(d) (class actions). (Can bring in interpleader as long as he is from a different state than defendant bringing him in. Class action – one P has to be from a different place than one D.)
   3. Diversity is **measured at the time the action is commenced.** (It’s possible to fix diversity by dropping a non-diverse party later, though it should not be relied on.)
6. **Determining citizenship**
   1. Citizenship =  **domicile.** (Place where you live and intend to stay; looks to most recent place domiciled)
      1. *Ochoa v. PV Holding Corp.*-Katrina evacuee not a resident of Texas (Factors: permanent employment, driver’s license, intent to stay, actual residence, bank accounts, property, clubs and churches, home)
   2. A **permanent resident** is a citizen in whichever state domiciled.
      1. *Mas v. Perry*-French citizen in US for school not a citizen of state.
7. **Business citizenship**
   1. Corportation: Where headquarters are (nerve test). Beat out muscle test. (Determined for good in *Friend v. Herz*.)
   2. Partnership: Citizen of every place that a partner is a citizen.
8. **AIC requirement**
   1. $75K exclusive of interest and costs
   2. congressional, not constitutional.
   3. Must be alleged in good faith; To dispute, D must show “to a legal certainty” that P could not recover that amount.
   4. Actual recovery not looked at.
9. **AIC aggregation:**
   1. Aggregate if just one P against one D
   2. Do not aggregate if there are multiple parties except if:
      1. Claims are “joint” or “common and undivided” (“same transaction or occurrence”) (Interpretation of 1332.)
      2. Where one P satisfies the AIC requirement, the claims of other P’s for less than the jurisdictional amount can be joined if they are part of the same case or controversy
10. **Joinder**
    1. Look for fraudulent joinder.
    2. 1447(e): If P seeks to join D’s that will destroy diversity, court can deny joinder or can allow and remand to state court. (Essentially a necessary and indispensable analysis.)

FEDERAL QUESTION

**28 USC 1331.**

The district courts shall have original jurisdiction of al civil actions arising under the Constitution, laws, or treaties of the United States.

1. **Well-pleaded complaint rule** (*Louisville RR v. Mottley*): P is the master of her complaint and can sue where she wants. Only look at the face of the complaint for 1331 evaluation.
   1. **Policy for:** Certainty, ease to apply, resolves question early, honors P’s choice in where to bring the case, even if federal question stays in state court USSC can have last review under 28 USC 1257
   2. **Policy against:** If there is a real issue of federal law at stake you may still lose jurisdiction even where Congress intended for you to have it, we trust state judges in applying federal law every once in a while because the virtues of the case are more important that federal judges deciding every issue
2. **Exceptions to WPCR** (inquiry will “pierce through the pleading”):
   1. Artful Pleading: Plaintiff asserting false federal claims to try and get into federal court. (Ex: *Mottley*)
   2. Artful Pleading: Plaintiff only asserting state claims to try and avoid federal court.
      1. **Ordinary preemption** (still doesn’t get D into federal court): Where federal law trumps state law, federal law wins – Article 6 Supremacy Clause
      2. **Complete preemption:** Sometimes statutes are said to so “completely preempt” in the field that federal jurisdiction cannot be avoided. “Congress has eviscerated all evidence of state law.” Only 3 examples where SC has interpreted complete preemption (e.g. nuclear law).
      3. **Substantial federal question:** Substantial federal issues that must be decided in the process of adjudicating state law claims.
         1. Congress could:
            1. Pass a law prohibiting conduct but not creating a private cause of action
            2. Pass a statute that expressly grants a private right of action
            3. Pass a statute that prohibits conduct and does not expressly create a private cause of action but the court interpret a private cause of action
         2. Usually the Holmes “Creation Test” from *American Well Works*. If federal law created the cause of action the case arises under 1331. If state law creates the cause of action, it does not. But/for test.
         3. Some state law claims can have FJ under 1331.  *Grable* test:
            1. Substantial federal question necessary to the resolution of the dispute (and actually in dispute)
            2. Do not upset the balance of state and federal courts (comity)

Don’t want federal courts to step on state court toes. State interest in certain claims.

Don’t want to get involved in state political issues.

* + - * 1. Before development by *Grable* there was *Osborne* (developed by *Grable*): “more than a mere ingredient”
        2. *Merrell Dow*-If resolution of a federal claim would be helpful but is not necessary, not good enough. “No welcome mat.”

1. **Cases:**
   1. *Louisville RR v. Mottley*-Plaintiffs were injured on the railroad and were given free passes for life. Federal legislation was later enacted prohibiting free rides on the railroad. The railroad revoked the passes and the plaintiffs sued on state breach of contract claims. They tried to get into federal court because defendants would use the legislation as a defense and this would pose a federal question. Court ruled that a prospective defense does not fall under the original jurisdiction of 1331.

STRATEGY

1. “P is the master of his complaint.” Can choose to avoid claims arising under federal law by carefully choosing remedies sought or by disavowing damages above $75K.
2. State judges are elected, federal judges are appointed. (Differences in interest, demographic, education, bias.)
3. In federal court you can potentially transfer and consolidate cases in a way that you cannot do in state courts. (Litigation risks and costs, class actions – want to avoid, multi-district litigation – individual P’s get little or no say-so.)

SUPPLEMENTAL JURISDICTION

BEFORE 1367 ENACTED IN 1990

1. **Pendent Jurisdiction**
   1. Stretches jurisdiction from a federal claim to encompass a closely related state law claim between the original parties.
   2. ***Gibbs****-*1) Originally federally sufficient claim. 2) “Common nucleus of operative facts.” 3) “Would ordinarily be expected to try in on proceeding.”
   3. Codified in 1367(a).
2. **Ancillary**
   1. Expands authority over a diversity claim to encompass other related claims that would otherwise defeat jurisdiction.
   2. ***Kroge****r*-where there is Constitutional power and congress has not denied nor intended to deny the exercise of jurisdiction; congress did not intend total inflexibility that would jeopardize legal rights or effective resolution in requiring complete diversity; however, court declined to allow a non-diverse claim from an original plaintiff to a non-diverse third-party defendant because she could have just been strategically skirting diversity requirements
   3. ***Moore v. NY Cotton***-transactionally related state counterclaims – “logical relationship”
   4. Codified in 1367(b).
3. **Pendent party**
   1. Extends jurisdiction to parties otherwise not subject to federal jurisdiction because the claim arose from a CNOF.
   2. ***Finley v. US***-Court declined to assume full Constitutional power. *Gibbs* test is not enough. Parties to related claims cannot necessarily be sued in federal court. (OVERRULED.)
   3. Codified in 1367(a). (Overruled Finley.)
4. **Interpleader, cross-claims** all ultimately found to be okay (by ancillary or pendent party jurisdiction)

STATUTE

**28 USC 1367. Supplemental jurisdiction**

1. Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. Such supplemental jurisdiction shall include claims that involve the jointer or intervention of additional parties.
2. In any civil action of which the district courts have original jurisdiction founded solely on section 1332, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the FRCP, or over claims by persons proposed to be joined as plaintiffs under Rule 19 or seeking to intervene as plaintiffs under Rule 24, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of 1332.
3. The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
   1. The claim raises a novel or complex issue of State law,
   2. The claim substantially predominates over the claim or claims over which the district court has original jurisdiction
   3. The district court has dismissed all claims over which it has original jurisdiction
   4. In exceptional circumstances, there are other compelling reasons for declining jurisdiction.
4. The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period.
5. Gets rid of labels; all “supplemental jurisdiction.”
6. **One test:** “same case or controversy” – Courts still look at the Gibbs standard:
   1. Claim has to be “non-frivolous” to be a substantial federal claim (from  *Bell v. Hood*)
   2. Common nucleus of operative fact between the federal and state claims.
7. 1367(b): If FJ is on diversity, there are some cases where even though it is constitutionally alright, FJ will not be allowed.
   1. Claims by P against person under 14, 19, 20, 24
   2. Claims by persons proposed to be adopted as P under 19 or seeking to intervene as P under 24 when FJ would be inconsistent with 1332
   3. What about when third party D asserts claim against original P and P has a compulsory counterclaim? What happens with 13(a)? Some courts say not compulsory. Most courts say they are no longer a P so the claim becomes a counterclaim by a D.
8. ***Exxon v. Allapattah*** (class action)
   1. Named Party (TX) v. Exxon (NY) [state claim for more than $75K], Non-named parties (NY, DE, NY, OH, etc.) v. Exxon (NY) [state claims less than $75K]. All allowed.
   2. Rule: Only look to the citizenship of the named P’s. Old case: *Zahn* – said you could not ignore AIC for any P.
   3. Split among jurisdictions about how to interpret 1367. SC overruled *Zahn*. Logic: 1367 never mentions Rule 23.
9. ***Ortega v. Star-Kist***
   1. P1 (PR) v. Starkist (DE) [state claim for $100K], P2 (PR), P3 (PR) v. Starkist (DE) [state claims less that $75K].
   2. Question: Does court have original jurisdiction?
   3. Argument: Must have original jurisdiction over each claim independently. Court rejects.
   4. As long as one claim satisfies the amount in controversy requirement and you have complete diversity, 1367(a) says you can join if you have CNOF.
   5. Why distinguish between AIC and complete diversity? Rationale for complete diversity: “contamination theory” – if a D is from the same state as a P, the bias will cancel out.
   6. What about 1367(b)/Rule 20? Doesn’t apply here because no new D is being brought in as a party.
10. **Discretion:**
    1. Judicial efficiency
    2. Convenience
    3. Fairness
    4. Comity
    5. State claims predominate

STRATEGY

1. **Must always have anchor claim.** To get out of supplemental jurisdiction, D can either attack the jurisdiction of the pendent claim of the anchor claim.
2. Theoretically, can remand over even the smallest state law issue.

REMOVAL

STATUTES

**28 USC 1441. Actions removable generally**

1. Any civil action in which the federal courts have original jurisdiction may be removed by the defendants to the corresponding district court.
2. Any federal question is removable regardless of citizenship. Diversity cases can only be removed if none of the D’s are citizens of the state in which the action is brought.
3. When there is a 1331 claim joined with otherwise non-removable claim, the entire case may be removed, or the district court may, in its discretion remand all matters in which state law predominates.

**28 USC 1446. Procedure for removal**

1. A defendant shall file a notice of removal with the district where the action is pending, pursuant to Rule 11, containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon each defendant.
2. The notice shall be filed within 30 days after the defendant receives a copy of the initial complaint, through service or otherwise, or within 30 days of summons if the initial pleading is not required to be served on the defendant, whichever is shorter. If not initially removable, you have 30 days after which it is ascertained that the case has become removable. Except 1332 cases cannot be removed more than 1 year after the action commences.
3. Promptly after filing notice of removal, D must give written notice to all adverse parties and shall file a copy of notice of removal with the clerk of the state court, which will effect removal.
4. If P sued on federal law claim, he can still choose to sue in state court unless there is exclusive federal jurisdiction (patent, admiralty, foreign state, aliens).
5. Removal is waiveable. Remand is not reviewable. Judges will likely err on the side of remand because they can’t get reversed.
6. Trend that removal statutes are to be construed against removal. (*Burnett*)
7. 1441(c) applies to any claim where jurisdiction is conferred by 1331, even if jurisdiction is redundantly conferred by another section. (*Burnett*)
8. **Attorney’s fees under 1447(c)**: Should be awarded where removing party has no objectively reasonable basis for seeking removal. (*Martin v. Franklin*)

EXAMPLES

Texas Citizen v. New York Citizen

State cause of action for $100,000

***If Tx citizen wants to sue in Texas, in what court(s) may she do so?***

State or federal.

NY Citizen v. Tx Citizen

(state cause of action for $100,000)

***If case is filed in State District Court, Harris County, Tx, can Tx citizen remove the case? If not, why not?***

No. 1441(b), second sentence. Local defendant exception.

State District Court, Harris County, Texas

Texas Citizen v. New York Citizen

(state cause of action for $100,000)

***If D removes the case:***

***What documents does he file (and where)?*** 1446(a) notice of removal with the federal court (Don’t file with state judge. You just do it. Then give notice of removal to P. P cannot stop you. Can only file a motion to remand.) Notice of filing a notice of removal with state court under 1446(d).

***By what date must he remove?*** 1146(b) 30 days after the receipt by the defendant, through service or otherwise, notice of the claim. USSC *Murphy Brothers* – clock starts ticking from day D gets formally served. Otherwise could send informal notice before filing suit and clock would run out. Must include copy of underlying pleading, else D may not know if claim is removable.

***What if D first filed an answer one week after being served and then, the next day, sought to remove the case?******What result?*** Removal must be the first thing you do. You cannot seek affirmative relief with the state judge. (Don’t want D to ask for an early dismissal, get denied, and then move to federal court because he doesn’t like the result.) What about the fact that SMJ is not a waiveable defense? We are not in federal court. State SMJ is not affected by 12bwhatever.

State District Court, Harris County, Texas

Texas Citizen New York Citizen

(state cause of action: damages not plead)

Most common circumstance. In most states you are not allowed to plead the amount in controversy. Some states even prohibit it.

***What does NY Defendant do now? What is the burden of proof in this circumstance and who bears it?*** D must prove. Courts are mixed as to what the standard is you must satisfy. Most common answer is that D must show that D’s claim likely involves issued over more that $75K. Preponderance of the evidence standard. Normally P will not object strenuously. Usually only a battle when right on the border, or when P is seeking something really other than money damages, e.g. an injunction. P can voluntarily choose to disavow damages above $75K. Almost always honored.

***What if P wants to seek remand. What is the burden of proof in this circumstance and who bears it?*** Normally party who wants to be in federal court bears the burden of proving jurisdiction. Here, burden is shifted to P, usually to show that to a legal certainly she cannot recover 75K. Split in courts. Some say same standard as D above.

***What if NY D asserts that in calculating AIC, you include punitive damages but the law in circuit is clear that you do not?*** Would have to be remanded to state court. Compare to *Martin v. Franklin*. 1447(c) may allow award of attorney fees for improvidently removing the case.

***What if the court believes that the defendant was wrong to remove but the P does not make this AIC/punitive damage argument? Is the argument waived?*** No. Rule 12 waiver rules. SMJ never waiveable. Court can sua sponte dismiss.

State District Court, Harris County, Texas

Texas Citizen v. Texas Citizen

(state cause of action for $100,000)

***If D was a Texas citizen at time action filed in state court, but one month later relocates to establish a new citizenship in Oklahoma, can he then remove the case to federal court? Why not?*** No. Citizenship at time the action was commenced.

State District Court, Harris County, Texas

Texas Citizen Texas Citizen

(state cause of action: federal defense asserted by Defendant )

***May D remove case to federal court?***No. *Mottley*. “Well-pleaded compliant rule” 1331. So 1441 would not allow original jurisdiction.

***If it does, what result****?* 1447(c) award of attorney fees.

***Are there ever instances when a D can remove a case to federal court when removal is based only on the existence of a federal defense****?* Yes. Examples are 1442, 1443. (Federal officers, civil rights cases.)

State District Court, Harris County, Texas

Texas Citizen Texas Citizen

(state cause of action: federal defense asserted by Defendant )

***After D asserts his federal defense, P may not remove case to federal court. There are two reasons why P may not. What are they?*** 1) It doesn’t come within original jurisdiction. 2) Only party that can remove to federal court is a D.

***Would the result change if instead of it being a federal defense, the D asserts a federal counterclaim?*** No. Still no original jurisdiction. Still a P for removal purposes. P’s pleading doesn’t raise a question of federal law.

State District Court, Harris County, Texas

Texas Citizen Texas Citizen

(state cause of action)

***If D wants to remove the case based on 1331, what arguments must she make to have a chance at successfully doing so?***Grable. 2 exceptions to when P is not master of complaint. Artfully pled – substantial question of federal law. Or complete preemption. If P files a motion to remand, burden of proof falls on D to prove.

State District Court, Harris County, Texas

Texas Citizen New York Citizen

(state cause of action for $100,000)

Ohio Citizen

(state cause of action for $100,000)

***If NY wants to remove the case now, what must it do?*** Get Ohio to agree. Then file. 1441(a) requires agreement, but doesn’t say explicitly. Unanimity among all Ds.

***What if NY Defendant does not do what it was supposed to do? How is P to challenge once case has been removed?*** Move to remand.

***What if NY D does not do what it was supposed to do, and court is aware of this. But P does not make this argument? Is the argument waived?***Waiveable. This doesn’t go to subject matter. Just a procedural defect. 1441(c).

State District Court, Harris County, Texas

Texas Citizen New York Citizen

(state cause of action for $100,000)

Texas Citizen

(state cause of action for $100,000)

***If Tx citizen brings suit against NY and Tx originally (on January 2, 2009), case is not removable because there is not complete diversity of citizenship.***

***But what if plaintiff voluntarily drops Tx defendant from case on Sept 22, 2009?*** 1446(b) Can remove 30 days after an amended complaint. NY can remove. Strict 1-year removal limit on diversity cases.

***Note, however that if Tx defendant is dismissed from case by way of summary judgment on Sept 22, 2009 granted against the P and in favor of the Tx defendant, case cannot be removed by remaining NY defendant.*** This is a quirky rule that distinguishes between voluntary and involuntary dismissals that isn’t easily explained. Probably has to do issue that dismissal may not be “final” until all appeals run. However, cf. WWV case.

***Why didn’t this happen in WWV?*** 12b2 dismissal came ultimately from USSC. No repeals left. Distinction gone. D’s not coming back.

***What if plaintiff drops Tx defendant from case on January 22, 2010?***No. 1-year bar.

***What other means are there by which NY could argue that the case should be subject to removal?***Fraudulent joinder.

State District Court, Harris County, Texas

Texas Citizen New York Citizen

(state cause of action for $100,000)

Assume that NY Defendant removes case to federal court:

Federal District Court

Texas Citizen New York Citizen

(state cause of action for $100,000)

***If Tx plaintiff, post removal, wants to add a Texas defendant after case is removed to federal court, what result? What rules and statutes bear relevance to this analysis?***

1447(e). Court may deny joinder or permit joinder and remand. Basically indispensible party analysis.

***Would it change the result if NY Defendant removes case to federal court based on federal question jurisdiction, like this:***

Federal District Court

Texas Citizen New York Citizen

(federal cause of action – defendant removed case under §1331)

*Removable by D, so the state claim can come along by supplemental jurisdiction if the claims are so related. 1441.*

State District Court, Harris County, Texas

Texas Citizen New York Citizen

(state cause of action for $100,000)

(state cause of action for $30,000)

***Can D remove both claims? When and under what authority?***Yes. Complete diversity, 1 P, 1 D, aggregate claims.

***What if second claim is by a second TX P*?** 1441 if original jurisdiction. Starkist. Assuming meets 1367(a), can come along for the ride.

State District Court, Harris County, Texas

Texas Citizen Texas Citizen

(federal cause of action )

(state cause of action)

***Can D remove both claims now? When and under what authority? Do you see any constitutional problem here with at least certain applications of the statute?*** 1441(c) if you have a separate and independent claim, within 1331 that is joined with an otherwise nonremovable claim, the entire thing is removable. Probably unconstitutional.

***If removal of both is allowed, what if state law claim predominates?***May remand, but doesn’t have to. 1441(c) rarely seen.

CHOICE OF LAW

STATUTES

**28 USC 1652. State laws as rules of decision**

The laws of the several states, except where the Constitution or treaties of the United States of Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

**28 USC 2071. Rule-making power generally**

1. The SC and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure proscribed under section 2072 of this title.

**28 USC 2072. Rules of procedure, evidence, power to proscribe**

1. The SC can prescribe general rules of practice and procedure and rules of evidence for federal courts.
2. Such rules to not modify any substantive law.
3. Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291.

HISTORY

|  |  |  |
| --- | --- | --- |
|  | **Procedural Law** | **Substantive Law** |
| **Before 1938** | **State;** Conformity act (rules of whatever state the court sits in) | **Federal** (except for state statutes); federal common law; *Swift v. Tyson* |
| **After 1938** | **Federal;** Rules Enabling Act | **State;** *Erie RR v. Tompkins* |

ERIE DOCTRINE

1. ***Erie RR v. Tompkins***-Overruled *Swift*. Swift usurped the law-making function reserved for the legislative branch. The federal courts have no such authority in the scheme of our Constitution to apply law to the states. There is no such thing as federal common law.
   1. Allows courts to make procedural law, but not substantive law
2. **Really only matters in federal court on diversity jurisdiction.** (On arguable procedural circumstances.) If substantive, clearly state or federal law applies. If clearly procedural or substantive, there is no Erie problem.
3. **Reasons for Erie:** concern about forum shopping, scope of congressional power, separation of powers
4. ***Shay Grove v. Allstate***-P’s filed class action saying they were entitled to payments from D. P’s violated the NY statute that created the cause of action because it also prohibited a class action for that particular cause. P’s did not, however, violate FRCP 23. P said procedural. D said substantive law under the statute that provided the cause. Court said rule 23 preempted.
5. **Statute** (federal statute v. some other state law)
   1. Does it apply? (most work done here)
   2. Is it constitutional?
   3. If so, federal statute applies.
6. **Federal rule** (Rules Enabling Act – 28 USC 2072)
   1. Does it apply? (most work)
   2. Does it violate REA (abridge a substantive right)? (never failed)
   3. Is it constitutional? (never failed)
   4. If so, federal rule applies.
7. **Federal rule, not statute or FRCP**
   1. Does it apply?
   2. Would applying the rule violate the “twin aims of Erie”? (*Hannah v. Plummer*)
      1. Prevent forum shopping
      2. Prevent systematic unfairness in administering the law
   3. Would it interfere with an important state interest? (*Byrd v. Blue Ridge*)
   4. If not, use federal rule.

DISCOVERY

RULES

26 – General

27 – Depositions to Perpetuate Testimony (Pre-Trial)

30 – Oral Depositions

31 – Written Depositions

33 – Interrogatories

34 – Producing Documents, Electronic Information, Tangible Things, and Entering Property for Inspection

35 – Physical and Mental Exams

36 – Requests for Admission

37 – Failure to Cooperate, Sanctions

CONSIDERATIONS

1. Basic objections:
   1. **Plaintiff:**
      1. D’s stonewalled
      2. Say privileged when not
      3. Take forever
      4. Dump info (needle in a haystack)
      5. Objecting unnecessarily
   2. **Defendant**
      1. P’s are asking for too much
      2. Over-broad
      3. P’s fishing
      4. Big cost burden
2. Discovery almost never happens or is very modest. But in the small amount of cases where it is an issue it is almost always off track.
3. If you allow P past the **pleadings,** the next phase is discovery.
   1. **D’s say:** legalized extortion; high discovery costs force you to settle
   2. **P’s say:** too strict a pleading standard filters out good cases that just need a bit of discovery
4. Rule reform on the horizon

TYPES OF DISCOVERY

1. **Informal:**
   1. Prior to and/or during suit
   2. Google, encyclopedias, etc.
   3. Don’t need authorization from the rules
   4. Less costly than formal discovery
2. **Mandatory disclosures (mainly Rule 26(a)):**
   1. At the beginning of suit, **must disclose:**
      1. Names and addresses of all persons likely to have information
      2. All documents in support of the disclosing party’s claims or defenses. Don’t have to produce information harmful to you; adversarial system.
      3. Computation of damages
      4. Insurance agreements
      5. Expert witnesses [due 90 days before trial]
   2. 26(f) requires a conference as soon as is practical after suit is filed to consider settlement and develop a proposed discovery plan. 26(a) initial disclosures are due within 14 days after the conference. Don’t have 26(f) until you are ready for 26(a). **Formal discovery cannot begin until after this conference.** 21 days after 26(f) is the 16(b) meeting with the judge.
   3. Policy: These things are so normally unobjectionable. Why wait? Move things along and make discovery more efficient. Objections highly disfavored.
   4. Cost: Least expensive, form prepared, standard questions.
3. **Pre-suit (Rule 27):**
   1. To perpetuate testimony that might otherwise be lost
   2. Majority view: Can rarely do pre-suit discovery; only if dying witness, going to flee, etc.
   3. Texas: Can use pre-suit to investigate potential suit; unique rule
4. **Oral Depositions (Rule 30):**
   1. No more than 10 per side unless agreed upon under 30(a)(2)(A).
   2. One day of seven hours maximum per witness
   3. Can depose parties or third parties
   4. Fixes witness testimony for fact establishment and potential impeachment
   5. Most expensive discovery. If each side deposes 10 witnesses for 7 hours, total cost is about $40K.
5. **Written Depositions (Rule 31):**
   1. Like interrogatory. Just for non-parties.
6. **Interrogatories (Rule 33):**
   1. No more than 25, counting each subpart that is a stand alone question.
   2. Can only be sent to parties
   3. Benefits: Allowing specific information (unlike request for production) and forcing a party to answer; party must swear answers are true.
   4. Problems: Drafted by lawyer who has 30 days (as compared to on the spot depositions)
   5. Don’t have to send all at once
   6. Cost: Must tailor to specific case; no standard form
   7. Have 30 days.
7. **Documents, property, and things for inspection (Request for Production) (Rule 34):**
   1. Unlimited
   2. Can be sent to parties or nonparties (though nonparties may have to be subpoenaed under Rule 45)
   3. Have 30 days to respond
   4. Very expensive. Must be tailored to case.
   5. Theoretically not alterable like witness testimony
8. **Physical and Mental Exams (Rule 35):**
   1. Have to have court order
9. **Requests for Admission (Rule 36):**
   1. Unlimited number
   2. Can only be sent to parties
   3. Can only admit or deny (or say not enough information)
   4. Typically used to narrow the scope of the case
   5. Once admitted, permanent for the rest of the trial; less things you have to prove up.
   6. Must respond within 30 days or presumed to admit
   7. Must be tailored to specific facts of the case
10. **Electronic discovery**
    1. Duty to keep information “when a party reasonably should know that the evidence may be relevant to anticipated litigation.” (*Teague*)
    2. Sanctions for spoliation (*Teague*)
       1. Dismissal (only for bad faith conduct)
       2. Adverse inference instruction – requires:
          1. Party had an obligation to preserve the information
          2. “Culpable state of mind” – bad faith/knowing destruction, gross negligence, or ordinary negligence could all suffice
          3. Evidence was relevant to the claims or defenses to the extent that a reasonable fact-finder could conclude that it would have supported the party that sought it
    3. Possible cost-shifting(*Quinby*)
       1. Factors weighed in descending order
          1. Extent to which the request is specifically tailored to discover relvent information
          2. Availability of information from other sources
          3. Total cost of production compared to AIC
          4. Total cost of production compared to the resources available to each party
          5. Ability of each party to control costs and incentive to do so
          6. Importance of the issues at stake in litigation
          7. Relative benefits to the parties of obtaining the information
       2. Awarded 30% of costs in this particular case. In *Zubulake III*, 25%.
11. **What can D do?**
    1. **Object**
       1. See 26(b).
       2. Other side can file motion to compel; then there is a hearing with a judge.
       3. Overly broad/unduly burdensome (*Moss* – burden is on objecting party to show this; unless overly broad or unduly burdensome on its face).
       4. Privileged.
       5. Relvancy.
       6. Can get the information elsewhere.
    2. **Object but** subject to your objection produce the information you can within a reasonable limit. (Compromise.) Preserve your objection, but cooperate.
12. **Sanctions (Rule 37):**
    1. Adverse inference instruction
    2. Dismissal (usually reserved for bad faith conduct)

PRIVILEGES

GENERALLY

1. Privileged information is **exempt from discovery** by way of the Rules of Evidence.
2. **Ex:** Husband/wife, priest/penitent, attorney/client.
3. Still a duty to stop a **prospective act.**
4. **Privileges can be waived:**
   1. Can waive **intentionally**, eg. for strategic advance, but if you waive, then **completely waived.**
   2. If you **inadvertently** waive, then the consequences are lessened by FRE 502(b) and FRCP 26(b)(5)(B).
      1. 26(b)(5)(B) – “claw rule”: Can send letter demanding the documents back.
         1. 85% of all costs for document production come from an attorney or paralegal reviewing documents before privilege before they turn them over.
         2. Rule-makers try to diminish this by allowing the claw rule as long as a reasonable system is in place for trying to prevent production of privileged documents.
      2. FRE 502(b) – claw rule specific to attorney-client privilege or work-product protection. Response to the sheer volume of information now.
         1. Not really being used: Old habits dies hard, looking through lots of documents is a revenue stream, new rule so not a lot of awareness.

ATTORNEY-CLIENT PRIVILEGE

1. **Elements (*Upjohn v. United States* – CM 142-50):**
   1. Legal advice sought
   2. Sought from legal advisor in her capacity as such
   3. Subject of communications relating to that purpose
   4. Made in confidence
   5. By the client or client’s representative
2. **CM 151 – Problem 2:**
   1. Close argument, but legal advice probably could be sought. Could do business on a golf course. But hard case because on unusual setting. Need to know nature of communication. Business in not necessarily legal advice. [Dilemma w/ general counsel – employer and lawyer. Make both business and law decisions every day.]
   2. Yes. But could debate he was in the position of a friend at the time.
   3. See 1,2.
   4. Outdoors, but maybe isolated? Need more facts.
   5. Debatable. Engineer = company?

WORK-PRODUCT PROTECTION

1. Not a privilege, but a protection.
2. *Hickman* = common law 🡪 later in 26(b)(3)(A)
3. **Elements:**
   1. Documents or other tangible things
   2. Prepared in anticipation or preparation for litigation or trial
   3. By or for a party or its representative
4. **Exception**s:
   1. 26(b)(3)(A)(i) – If otherwise discoverable.
   2. (A)(ii) – substantial need for the materials and undue hardship in obtaining them otherwise
   3. (B) – “core work product” – metal impressions, conclusions, opinions, or legal theories
5. ***Hickman v. Taylor* (Pages 340-46)**
   1. Court declined to force disclosure of oral statements made to one side’s attorney pre-trial.
   2. Burden rests on the one invading privacy to establish adequate reasons to justify production through a subpoena or court order.
6. **CM 151 – Problem 1:**
   1. Not a document but an oral communication. Arguments: Will ultimately be a document (loser); \*\*intended to codify Hickman – not limited to documents in the language so we should take a more broad view – most courts go by Hickman standard – 26(b)(3) not meant to replace Hickman – common law also protects other work products
   2. Yes
   3. Yes. Lawyer’s consultants are party representatives.
   4. Exceptions? Probably not. This looks like core work product.
   5. Wood is arguably and expert under 26(b)(4).

JUDGMENT AS A MATTER OF LAW

|  |  |  |
| --- | --- | --- |
| BEFORE TRIAL | DURING | AFTER VERDICT |
| 56 | 50(a) | 50(b) |
| MJS | JMOL | RJMOL (JNOV) |

1. How is summary judgment different that 12(b)(6)/12(c)? 12 only looks at the pleading. 56 looks at evidence. There isn’t a reason to empanel a jury if there is no dispute of fact for them to decide.
2. Can end or narrow a case. Can MJS on elements (partial SJ; e.g. if D should have admitted but didn’t), or on the whole case.
3. Rule 50 is the equivalent of summary judgment after trial has begun.

DEFENDANT’S BURDEN (MOVANT)

CELOTEX v. CATRETT (ONE OF 1986 TRILOGY OF MOST CITED CASES)

1. Courts perceived a bias (though empirical data opposite) against SJ. Wanted to send the message that SJ should not be disfavored.
2. Catrett works for construction, claims he was exposes to asbestos, and sues several manufacturers, including Celotex. Celotex moved for SJ because Catrett showed no evidence that he was exposed to a Celotex product. Celotex attached Catrett’s interrogatory answer saying he had no witnesses of exposure to Celotex asbestos.
3. Celotex says all they have to do is say, “I don’t think they have met their burden.”
4. Appellate courts said Celotex didn’t meet their burden. That the movant’s burden is to show that there is no issue of material fact. Can’t just make someone present their evidence.
5. SC reversed. Movant need merely say “I don’t think they have evidence. Show me what you have.” (Pg. 478-479) **Need to point out that there is an absence of evidence supporting the non-movant’s case.**
6. **Idea: P bears the burdens of production and persuasion;** the burden of producing some evidence on which a reasonable jury could find for him. We don’t’ want P to trick the jury when there is really not enough evidence. If you are the party that does not bear the burden, why should you have to produce evidence to dismiss the case? Very low burden for the movant when the movant doesn’t bear the burden.
7. Ambiguity on Pg. 479 – Most courts have said it is enough to file a document saying show me your cards. Minority: Not enough to use MSJ as another discovery device. Celotex has extra stuff. Some courts require. Practically, lawyers are going to do more than a no-evidence MSJ. Will be more thorough and back P into a corner.

PLAINTIFF’S BURDEN (MOVANT)

1. Celotex has no application here.
2. **Must SHOW there is no genuine issue of fact** and that you are entitled to judgment in your favor.

NON-MOVANT’S BURDEN

BACK TO CELOTEX

1. Assuming movant has discharged their burden, what does the nonmovant have to do to survive?
2. SC silent on this in Celotex. Appellate court didn’t get there the first time. SC remanded to decide this question.
3. In Celotex, appellate court said P have enough evidence to survive. (Interrogatory answer – can’t be SJ evidence; not admissible because Celotex never got to cross.) (Depo transcript from Catlett.)(Hoff (secretary) letter – court considered, but screwed up b/c letter is not in 56(c)(2). Need affadavit. Plus, Hoff was listed as a witness.) (Letter from Celotex’s insurance company – court considered, but should not have for same reasons above.)
4. Evidence for summary judgment has to be capable of being reduced to admissible form by the time of trial. See 56(c)(2).
5. Non-movant must bring some evidence on which, when construed in is favor, a reasonable jury could find for you.

Scott v. Harris

1. P says the cops used excessive force and his Constitutional rights were violated.
2. Key question: Could a reasonable jury have found that his rights were violated?
3. Have to construe in favor of P for MSJ. Why not here? Video clearly speaks for D. First time SC references video in opinion footnote.
4. Reality: Survey with widespread results. What about a reasonable jury. Are 25% of Americans unreasonable? Eliminating opportunity for jury dialogue.
5. Other hand: Strong feeling that this type of case has no merit. Ultimately won’t prevail. Where do we draw the line?